No. 1

Supreme Court, U.S.
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In The Supreme Court of the United States

RONNIE LYNN GOFORTH;
SUSAN D. GOFORTH;
and
WEAVER ENTERPRISES, INC.,

Petitioners,

v.

EAST TENNESSEE NATURAL GAS COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

DID THE FOURTH CIRCUIT ERR WHEN IT GRANTED EAST TENNESSEE NATURAL GAS COMPANY IMMEDIATE POSSESSION OF THE GOFORTHS' AND THE WEAVERS' FARMS BEFORE THE VALUE OF THE FARM WAS DETERMINED AND COMPENSATION PAID?

PARTIES TO THIS PROCEEDING

The petitioners are: (1) Ronnie Lynn Goforth and Susan D. Goforth ("the Goforths"), the owners of the 3.51 acres of land in Wythe County, Virginia, which is the subject of this condemnation action, and (2) Weaver Enterprises, Inc., the owner of 11.42 acres of land in Wythe County, Virginia, which is the subject of this condemnation action.

The respondent is East Tennessee Natural Gas Company ("ETNG").

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Petitioners Ronnie Lynn Goforth, Susan D. Goforth, and Weaver Enterprises, Inc. pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on March 22, 2004 and the order denying the petitions for rehearing entered on May 14, 2004.

OPINIONS BELOW

The March 22, 2004 opinion of the Court of Appeals, which is reported as *East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808, *rehearing denied*, 369 F.3d 357 (4th Cir. 2004) is set out at pages A-4 through A-25 of the Appendix. The May 14, 2004 order denying the petition for rehearing, reported at 369 F.3d 357, is at pages A-1 through A-3 of the appendix. The decisions of the district court, which are unreported, are at pages A-26 through A-56 of the appendix.

JURISDICTIONAL STATEMENT

The United States Court of Appeals entered its decision on March 22, 2004 (App. A-4). Several appellants sought rehearing of the panel decision, and the Court of Appeals denied the motions for rehearing on May 14, 2004 (App. A-1). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE AT ISSUE

This case requires this Court to determine whether the condemnation provisions of the Natural Gas Act (NGA), 15 U.S.C. § 717f(h), confer the right of immediate possession on a condemnor gas pipeline company prior to the determination of the value of the condemned property and prior to the payment of the fair market value to the owner of the condemned property.

15 U.S.C. § 717f(h) states:

> When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent

domain in the district court of the United States for the district in which property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $ 3,000.00.

STATEMENT OF THE CASE

The petitioners Ronnie and Susan Goforth own a dairy farm consisting of nearly one thousand acres in Wythe County, Virginia. The farm has been in Mrs. Goforth's family for generations. The petitioner Weaver Enterprises, Inc. also owns a large cattle farm.

ETNG applied to the Federal Energy Regulatory Commission (FERC) for a Certificate of Public Convenience and Necessity to construct the Patriot natural gas pipeline through Virginia, Tennessee, and North Carolina (App. A-7). The pipeline route runs through the Goforths' and Weavers' property. FERC granted ETNG a certificate. ETNG filed a complaint in the United States District Court for the Western District of Virginia to condemn the property and sought immediate possession before the payment of compensation (App. A-7). The district court granted the motion (App. A-9).

The district court ordered that the parties in all the cases appear for oral argument (App. A-52). Oral argument was held on April 10, 2003. The district court did not give any party the opportunity to present testimony but narrowed the issue of oral argument to whether the FERC certificate gave ETNG the right to possession of the property (App. A-52).

On May 8, 2003, the district court entered an Order and a Memorandum Opinion determining that ETNG had the right to condemn the property because it had obtained a certificate from FERC. The court granted the motion for immediate possession, but required that individual orders be entered relating to each defendants' property, including the Goforths' and Weavers' property. (App. A-29). The district court has not held a hearing to determine the value of the Goforths' and Weavers' property and no compensation has been paid to them. Instead, the district court appointed a commission which will determine the amount of compensation to be paid to the Goforths and Weavers at some point in the future.

The district court entered an Order relating to the Goforths' and Weavers' property on May 30, 2003 (App. A-50). On June 6, 2003, the district court entered a supplemental opinion explaining its reasons for granting the motion for immediate possession. (App. A-52). The Goforths and Weavers timely filed their Notice of Appeal on June 20, 2003 (App. A-9).

The United States Court of Appeals for the Fourth Circuit affirmed the district court's decision to grant the preliminary injunction on March 22, 2004 (App. A-25).

Several appellants timely sought reconsideration,

but only one judge voted to reconsider the panel decision, and the motion for reconsideration was denied on May 14, 2004 (App. A-2).

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and the Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) (review of interlocutory orders granting injunction).

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE FOURTH CIRCUIT'S DECISION CREATES A SPLIT BETWEEN THE CIRCUITS.

The Fourth Circuit's decision is in direct conflict with the Seventh Circuit's decision in *Northern Border Pipeline Co. v. 86.72 Acres of Land*, 144 F.3d 469 (7th Cir. 1998).

The Natural Gas Act ("NGA") contains no provision for a gas pipeline company to take immediate possession of property by eminent domain. The NGA simply states that any holder of a FERC certificate may acquire property "by the exercise of eminent domain in the district court." 15 U.S.C. § 717f(h).

Federal Rule of Civil Procedure 71A governs condemnation proceedings in district court. The rule does not provide for a condemnor taking immediate possession of property.[1] The rule requires the condemnor to file a

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[1] The advisory notes to Rule 71A state that the rule is "not intended to and does not supersede . . . any other statutes authoriz[ing] the acquisition of title or the taking of immediate possession." Fed. R. Civ. Pro. 71A advisory

complaint and the district court determines the value of the property. The condemnor then has the option of paying the value of the property to the landowner or the condemnor may dismiss the proceeding. As this Court has written, "[t]he practical effect . . . is to give the government an option to buy the property at the adjudicated price. If the government wishes to exercise that option, it tenders payment to the private owner, whereupon title and right to possession vest in the United States." *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 4 (1984).

Congress has created a mechanism for immediate possession, the Declaration of Taking Act (DTA), 40 U.S.C. § 3114. However, Congress has not extended the power of immediate possession under the DTA to natural gas pipeline companies.

In *Northern Border Pipeline*, the Seventh Circuit held that a district court did not have authority to grant a condemnor immediate possession under the NGA because neither the NGA nor Rule 71A authorizes immediate possession. 144 F.3d at 472. The Seventh Circuit noted that:

> Northern Border does not contest the district court's conclusion that its claim to immediate possession has no basis in substantive federal or state law. The company concedes that the Natural Gas Act does not create an entitlement to immediate possession of the land. Despite this lack of

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committee's note to Subdivision (a) (1951).

> substantive entitlement, however, Northern Border asserts that the district court should have exercised its equitable power to enter a preliminary injunction ordering the defendants to grant the company immediate possession.

Id. at 471.

The Seventh Circuit held that Northern Border would only have been entitled to a preliminary injunction if it had a "preexisting entitlement to the defendants' land." Id. at 472. To illustrate its reasoning, the court used the hypothetical example of two companies who cooperated in the development of software. If the party in possession of the software prevented the other party from obtaining access to the software, the court has the power to direct the delivery of the software to the non-possessing plaintiff if the plaintiff could establish that it would have been entitled to possession of the software prior to the filing of the lawsuit. The court wrote that a party would be entitled to a preliminary injunction to take possession of property if it would have been entitled to the property ex ante, not ex post:

> The difference between the software hypothetical and Northern Border's case is that the party receiving immediate possession of the software claimed an ownership interest in the property that, if it existed at all, was fully vested even before initiation of the lawsuit. In awarding the preliminary injunction, the court predicted what future proceedings would reveal about the *ex ante* state of affairs between the

> parties, i.e., that the plaintiff, not the defendant, had the right to possess the property. In contrast, Northern Border puts forth no claim that it has a preexisting entitlement to the defendants' land. Northern Border's rights to the defendants' land do not vest when FERC issues it a certificate . . . . Northern Border cannot gain immediate possession of the property through a preliminary injunction because it did not present an argument grounded in substantive law establishing a preexisting entitlement to the property. Since Northern Border disavowed any such substantive argument, the district court had no authority to enter a preliminary injunction awarding immediate possession.

Id.

The Seventh Circuit held that a preliminary injunction could not issue because Northern Border would have a substantive entitlement to the property only at the end of the "normal eminent domain process" and Northern Border was, therefore, not eligible for a preliminary injunction. Northern Border was not actually entitled to possession until the end of the eminent domain proceeding and the payment of compensation. Id.

Here, the Fourth Circuit has held the district court had the authority to grant immediate possession to the condemnor, even though ETNG did not have a preexisting claim to the Goforths' and Weavers' farms. The Fourth Circuit finessed the conflict between the two circuits by pointing out that the condemnor in *Northern Border*

Pipeline merely presented its FERC certificate as authority for the taking and did not first obtain a separate order from the district court determining that it had the right to condemn the property. However, this distinction makes no difference: the only reason why the district court held that ETNG had the right to condemn the property here was that it had obtained a certificate from FERC. The pipeline was required to do nothing more than present its certificate to obtain the determination from the district court that it had the right to condemn. The district court did not allow the presentation of any evidence; it treated the FERC certificate as conclusive. Thus, the only real difference between the *Northern Border Pipeline* facts and the facts of this case is that the district court here entered an order, based solely on the FERC certificate, that gave the Court's sanction to the taking based on the FERC certificate, while the Seventh Circuit recognized that such an order was not necessary because the FERC certificate was conclusive. The Seventh Circuit explicitly stated that "no one disputes the validity of the FERC certificate conferring the eminent domain power, nor could they do so in this proceeding." *Id.* at 471-472. Therefore, there is no real difference between *Northern Border Pipeline* and this case except that, in *Northern Border Pipeline*, the Seventh Circuit held that the FERC certificate alone did not give the pipeline company the right to take immediate possession, whereas the Fourth Circuit here has held that the FERC certificate did give ETNG the right to immediately take the Goforths' and Weavers' farms merely because the district court first entered an order stating the obvious fact that the FERC certificate gave ETNG the right to condemn the farms.

The Fourth Circuit misses the point of the Seventh Circuit's analysis: the Seventh Circuit said that Northern Border did not have a right to possession because it did not

have a preexisting right to possession and a preliminary injunction may only issue to a movant who had a preexisting, *ex ante*, entitlement to the relief which it seeks. In this light, there is absolutely no difference between Northern Border's entitlement to the property which it sought and ETNG's entitlement to the Goforths' and Weavers' farms. Neither Northern Border nor ETNG had any entitlement to possession of the property prior to the granting of the FERC certificate. After the FERC certificate was granted, both Northern Border and ETNG had the right to take the property by eminent domain, but that right could be exercised only through the eminent domain process. Neither Northern Border nor ETNG was entitled to take, on a preliminary basis, other peoples' property without first going through the eminent domain procedure, which requires that the court determine the fair market value of the property and requires the condemnor to pay just compensation.

Therefore, there is a fundamental and irreconcilable split between the Seventh Circuit's *Northern Border Pipeline* decision and the Fourth Circuit's *East Tennessee Natural Gas* decision.

As a result of this split of authority, landowners in the three states which are part of the Seventh Circuit have different rights of negotiation than similarly situated landowners in the five states in the Fourth Circuit, as explained in the next section of this petition, even though the purpose of the Natural Gas Act was to provide a uniform procedure for the construction of pipelines throughout the United States. Moreover, FERC and pipeline companies themselves are left in uncertainty as to the timing of pipeline companies' right to take pipeline right of way.

II. THE FOURTH CIRCUIT'S DECISION IS WRONG BECAUSE IT APPLIED A PRELIMINARY INJUNCTION PARADIGM WHICH WAS TANTAMOUNT TO CIRCUMVENTING RULE 71A AND DEPRIVED THE GOFORTHS AND WEAVERS OF THE BARGAINING POWER WHICH THEY ARE GUARANTEED BY FEDERAL RULE OF CIVIL PROCEDURE 71A.

A. THE PRELIMINARY INJUNCTION ANALYSIS IS MERELY A MEANS OF CIRCUMVENTING RULE 71A.

This Court should grant certiorari and decide whether the NGA confers upon the district courts the authority to grant immediate possession because this is an issue of national importance and the courts' decisions are developing in a direction contrary to the plain language of the NGA.

The construction of natural gas pipelines under the Natural Gas Act has been increasing since deregulation. Today, there are over 2 million miles of natural gas pipelines in the United States, counting onshore, offshore, and local distribution lines. Most of these pipelines are under privately-owned property. *See* www.aga.org.

Despite the fact that there is no authority for immediate possession under the NGA, the majority of district courts around the country have held that a pipeline company, once it obtains a FERC certificate, is entitled to take immediate possession of the private property in the route of the pipeline. The pace of these decisions is increasing. *See, e.g., Northwest Pipeline Corp. v. The 20'*

by 1430' Pipeline Right of Way, 197 F.Supp.2d 1241 (E.D. Wash. 2002); *Guardian Pipeline, L.L.C. v. 950.80 Acres of Land*, 210 F.Supp.2d 976, 979 (N.D. Ill. 2002); *Humphries v. Williams Natural Gas Co.*, 48 F.Supp.2d 1276 (D.Kan. 1999); *USG Pipeline Co. v. 1.74 Acres*, 1 F.Supp.2d 816, 825-26 (E.D. Tenn. 1998); *Kern River Gas Transmission Co. v. Clark County*, 757 F.Supp. 1110 (D.Nev. 1990); *Rivers Electric Co., Inc. v. 4.6 Acres of Land*, 731 F.Supp. 83 (N.D.N.Y.1990). The Fourth Circuit has now joined these district courts on this issue.

The premise of the Fourth Circuit's decision here and the district court cases which have granted immediate possession is that, even though the NGA does not give explicit authority for an immediate taking, a pipeline company is entitled to take immediate possession if it can satisfy the four elements for a preliminary injunction: (1) irreparable harm to the movant; (2) no harm to the respondent; (3) success on the merits; and (4) the public interest. However, this analytical framework, when applied to a gas pipeline's motion for immediate possession, does not achieve the traditional goals of providing preliminary relief to preserve the status quo or meet an exigency. The application of the preliminary injunction paradigm in this setting is not a means of determining whether immediate possession should be granted; it is merely a result-oriented device to ensure that immediate possession will be granted. The preliminary injunction paradigm is employed merely to guarantee pipeline companies the right to immediate possession which Congress and Federal Rule of Civil Procedure 71A have not provided, and to circumvent the procedures outlined in Rule 71A.

Under the Fourth Circuit's analysis, pipeline companies will always be able to demonstrate the risk of

great injury. The Fourth Circuit found that ETNG would face irreparable injury because it would take a long time to determine the value of all of the property along the pipeline route, FERC had set a deadline for the completion of the pipeline, and ETNG would not be able to fulfill the contracts which it has made for the delivery of gas from the pipeline if construction is delayed. All gas pipeline companies must first obtain a certificate of public convenience and necessity from FERC, which establishes a time-frame for the completion of the pipeline. 15 U.S.C. § 717f *et seq.* Therefore, ETNG here, and the pipeline company in every similar case, will always be able to show that it is "necessary" for them to complete their pipeline.

However, "necessary" does not equal "irreparable." In this case, the Fourth Circuit did not require a showing of truly irreparable injury: the Fourth Circuit merely stated that ETNG would be delayed, would lose money, and would not be able to meet its customers' demand for gas. These factors do not constitute irreparable injury: any injury of the type that the Fourth Circuit described can be remedied by FERC's adjustment of the construction schedule and recouped through the adjustment of the price which ETNG charges for gas once the value of the Goforths' and Weavers' property is determined, compensation paid, and the pipeline constructed.

Moreover, this injury is not unique and could have been anticipated by the pipeline company when it sought its certificate from FERC. This type of injury will always exist in a gas pipeline case; the company would not have received a FERC certificate of public necessity if the pipeline was not necessary. In fact, the same claim of injury was made to the Seventh Circuit in *Northern Border Pipeline*, 144 F.3d at 472. It was error for the Fourth

Circuit to deem such injury "irreparable," when ETNG has made no effort to adjust the FERC schedule, has made no showing that it cannot recoup any financial losses by adjusting its price, and when ETNG knowingly came to the injury when it applied to FERC for a certificate without allowing sufficient time to complete the project.

Similarly, under the preliminary injunction paradigm, the factors of success on the merits and the public interest will always be resolved in favor of the pipeline company, if the court merely looks at the fact that FERC has issued a certificate. Here, ETNG was required to do no more than present its FERC certificate to obtain an order from the district court saying it has the right to condemn the property. Once the order was entered, the district court necessarily found that ETNG would succeed on the merits and that, based on the FERC certificate, it is in the public interest for the pipeline to proceed. Under this decision criteria, a pipeline company will always be entitled to immediate possession once it obtains a FERC certificate.

The Fourth Circuit's preliminary injunction analysis does not resolve, or even address, the problem of "preexisting entitlement" that the Seventh Circuit identified in *Northern Border Pipeline*. The Fourth Circuit, like the Seventh Circuit, acknowledged that the NGA and Rule 71A do not allow immediate possession, but the Fourth Circuit has simply ignored the Seventh Circuit's recognition that, even if ETNG was able to show entitlement to a preliminary injunction under the traditional four-element preliminary injunction test, ETNG was not eligible for a preliminary injunction because it did not have a preexisting right to the Goforths' and Weavers' farms. ETNG was not suing to regain property which it owned

and was being denied by the Goforths and Weavers; it was suing to obtain property from them that it would only have a right to obtain after paying just compensation. Allowing ETNG to obtain the property prior to ETNG paying just compensation was giving ETNG property to which it was not yet entitled. The preliminary injunction should only have been issued to restore the *ex ante* position of the parties; ETNG was not entitled to a preliminary injunction which anticipated what the *ex post* position would be, without first requiring ETNG to pay the Goforths' and Weavers' for their property--a condition precedent to the parties ever getting to the *ex post* position.

Granting immediate possession through a preliminary injunction is merely a means of circumventing the procedures of Rule 71A because there are no cases in which a pipeline company would not satisfy the four elements of a preliminary injunction and gain immediate possession of landowners' property, even though such a procedure is not authorized by either the NGA or Rule 71A.

B. THE PRELIMINARY INJUNCTION PARADIGM DEPRIVED THE GOFORTHS AND WEAVERS OF THEIR RIGHT TO NEGOTIATE.

The fundamental problem with the application of the standard preliminary injunction paradigm to ETNG's motion for immediate possession is that it deprived the Goforths and Weavers of their valuable right to negotiate with ETNG.

15 U.S.C. § 717f(h) states that a gas pipeline company may "exercise of the right of eminent domain" in

district court only if it "is unable to agree with the owner of property to the compensation to be paid."

Under the procedure established by the NGA and Rule 71A, ETNG would not have been able to acquire the Goforths' and Weavers' property without first negotiating a price with them or suffering the costs of delay (which it claims is irreparable) until the court determined the value of the property and until ETNG paid the Goforths and Weavers just compensation. By allowing immediate possession under the preliminary injunction paradigm, the Fourth Circuit has fundamentally transformed the condemnation procedure by vitiating the requirement of negotiation.

The Fourth Circuit's preliminary injunction analysis does not recognize that the protocol established by the NGA and Rule 71A confer upon the Goforths and Weavers two separate entitlements: (1) a right to negotiate prior to trial and (2) a right to just compensation after trial. These two rights are different and have different values. After a trial, the Goforths and Weavers would have been entitled to no more than the fair market value of their property at the time of the taking. *United States v. Miller*, 317 U.S. 369, 374 (1943). But prior to the determination of the value of the property by the court, the Goforths and Weavers have the implied right, under the regime established by the NGA and under Rule 71A, to hold up the pipeline until the value of their property is determined and they are paid just compensation.

Under traditional rules (still embodied in the NGA and Rule 71A), ETNG should have borne the cost of delay prior to trial. In its motion for preliminary injunction, ETNG claimed that this cost was not only great, but

irreparable. Thus, under traditional rules, ETNG had an incentive to negotiate with the Goforths and Weavers so that the pipeline could proceed. Under the traditional rules, both ETNG and the Goforths and Weavers had bargaining power: ETNG had the power to hold out until trial, when it would not be required to pay more than fair market value, and the Goforths and Weavers had the power to hold up the construction of the pipeline until trial, which would have allowed them the opportunity to extract more than fair market value from ETNG, if ETNG agreed. ETNG may have agreed to pay a premium to allow the pipeline to proceed. Thus, prior to the trial, each party would have had an obligation and an incentive to negotiate with each other, obviating the need for the court to determine the value of the property.

If the parties could not reach an agreement, the law provides a formula for resolving the parties' deadlock, by requiring ETNG to pay fair market value, defined as "what a willing buyer would pay in cash to a willing seller" at the time of the taking. *Miller*, 317 U.S. at 374. This standard of valuation at trial is clearly different from the relative valuation which the parties assigned to the property prior to trial and which created an incentive for settlement by the Goforths and Weavers; they could not hold out for too long without risking the opportunity to obtain more than fair market value, and ETNG had an incentive to settle so that it did not have to wait too long to begin making profits from its project. Thus, the traditional rules of condemnation, and the structure of the NGA and Rule 71A, created an elegant and economically sound incentive for compromise.

By allowing ETNG immediate possession, the Fourth Circuit eliminated ETNG's incentive to negotiate

and, concomitantly, deprived the Goforths and Weavers of their opportunity to negotiate a settlement greater than fair market value prior to trial. It is important to note that ETNG received its FERC certificate on November 20, 2002 and filed these condemnation suits in December 2002, after merely making a take-it-or-leave-it offer to the landowners (App. at A-8).

The Fourth Circuit merely glosses over this by saying that "the Fifth Amendment guarantees the landowners just compensation for their land no matter when the condemnor takes possession (App. at A-23)." This statement is a *non sequitur* and conflates the Goforths' and Weavers' entitlement to just compensation after trial with their separate right to negotiate prior to trial. The Fourth Circuit's analysis does not recognize that, separate from the Constitutional entitlement to no less than just compensation as measured by fair market value, the Goforths and Weavers had a legal right under the NGA, Rule 71A, and traditional rules of condemnation, to negotiate a price higher than fair market value because ETNG was not entitled to immediate possession and should have had to wait for trial. The Goforths' and Weavers' desire to hold out until they reach settlement with ETNG or until after a trial and the payment of fair market value by ETNG was not monopoly rent seeking, illegitimate obstructionism, or gouging by the Goforths and Weavers.[2]

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[2] The premise of eminent domain is that it will sometimes not be possible to build public goods, like pipelines, by obtaining the voluntary cooperation of all the landowners along the way. The last landowner, like all the others, must be brought into line, and the way to do that is for the government to compel the sale by paying the landowners the highest value of the land in any alternative

It was merely rational behavior based upon the rules which Congress established in the NGA and which this Court approved in Rule 71A, and which neither Congress nor this Court has changed. The notion that holding out is bad is only true in the long run, if it prevents the creation of a public good or increases the overall transaction costs of the project. Under traditional rules, this should not happen: if the condemnor does not settle with the landowner, the landowner will in the end obtain nothing more than fair market value, regardless of its demands, and the project will be built; the only loss to the public is delay. The condemnor can avoid delay by settling, but it will have an incentive to settle only if the premium paid in settlement is less than the cost of delay. It is certainly true, in the creation of every public good, that the overall public cost of a project can be reduced if the traditional rules are not followed and the government is allowed to obtain immediate possession, and Congress has streamlined condemnation in the Declaration of Taking Act. But only Congress has the authority to authorize immediate possession, and it has not done so under the NGA.

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use. The public, including those whose property is taken, gains the benefit of the public good, and if compensation is correctly calculated, no landowner will suffer financial loss. Epstein, *The Limits of Liberty*, www.reason.com/0403/fa.re.coercion(2003). The use of eminent domain to assemble property for a public project has also been viewed as a bilateral monopoly situation, where each parcel owner has the power to hold out, increasing the project's transaction costs. *See*, *e.g.*, Merrill, *The Economics of Public Use* 72 Cornell L. Rev. 61, 75-76 (1986).

The Fourth Circuit's preliminary injunction analysis creates an exception to the traditional condemnation procedures, still embodied in the NGA and Rule 71A, which swallows the traditional condemnation rules themselves. There will never be a gas pipeline case in which landowner will not eventually receive the fair market value of his property, because such compensation is required by the Constitution. Moreover, the receipt of fair market value compensation will always be a mere timing issue.

The fallacy with this preliminary injunction analysis is that it does not recognize that the granting of a preliminary injunction in itself deprives the landowner of the right to negotiate and forever deprives the landowner of the opportunity to negotiate a settlement in an amount greater than fair market value. This is not merely an issue of the timing of the award; this is an issue as to the quantum of the settlement. The traditional rules, established by Congress through the NGA, create an opportunity for the landowner to receive, prior to trial, a quantum of compensation through negotiation which is greater than the fair market value of compensation which the Constitution guarantees after trial.

The incentive for negotiation allows the creation of public goods more quickly, through voluntary settlement, than could be achieved if the courts were required to settle every valuation issue. The Fourth Circuit's preliminary injunction paradigm streamlines the condemnation process and allows public goods to be created even more quickly, but only by destroying the incentive for condemnors to negotiate and thus forcing every valuation case into court. Even if the goal of this streamlining is to increase the speed of construction and to reduce transaction costs, this

streamlining merely shifts the determination of value from the parties to the courts and externalizes the cost of valuation to the court system. In the long run, this is no net gain--the transaction costs are merely shifted. The landowner bears the transaction cost of delay and the courts bear the transaction cost of determining value.

By allowing the immediate taking of the Goforths' and Weavers' property and eliminating, at the outset of the condemnation process, any incentive for ETNG to negotiate with them, the Fourth Circuit changed the rules of the game in gas pipeline condemnation, in contravention of the rules which Congress established in the NGA and in conflict with the Seventh Circuit. This Court should grant this petition for certiorari to resolve this conflict.

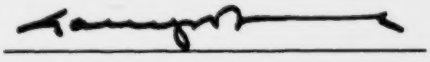
CONCLUSION

FOR THE REASONS stated herein the petitioners pray that this Court will grant this petition and review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully Submitted,

RONNIE LYNN GOFORTH AND
SUSAN GOFORTH

WEAVER ENTERPRISES, INC.

By: 

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No. _____

In The Supreme Court of the United States

RONNIE LYNN GOFORTH;
SUSAN D. GOFORTH;
and
WEAVER ENTERPRISES, INC.,

Petitioners,

v.

EAST TENNESSEE NATURAL GAS COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

APPENDIX

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Filed: May 14, 2004

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

EAST TENNESSEE NATURAL GAS COMPANY,
Plaintiff-Appellee,

v.

JOHN F. SAGE; LINDA K. SAGE,
Defendants-Appellants,

and

1.20 ACRES IN WYTHE COUNTY, VIRGINIA; MARY CASEL, Commissioner of Revenue; JOHN DOE, et al.; UNKNOWN OWNERS,
Defendants.

No. 03-1708
(CA-02-107-4)

EAST TENNESSEE NATURAL GAS COMPANY,
Plaintiff-Appellee,

v.

WEAVER ENTERPRISES, INCORPORATED,
Defendant-Appellant,

and

11.42 ACRES IN WYTHE COUNTY, VIRGINIA; MARY CASEL, Commissioner of Revenue; JOHN DOE, et al.; UNKNOWN OWNERS,
Defendants.

No. 03-1741

EAST TENNESSEE NATURAL GAS COMPANY,
Plaintiff-Appellee,

v.

RONNIE LYNN GOFORTH; SUSAN D. GOFORTH; 3.51 ACRES/WYTHE COUNTY,
Defendants-Appellants,

and

MARY CASEL, Commissioner of Revenue; JOHN DOE, et al.; UNKNOWN OWNERS,
Defendants.

No. 03-1797
(CA-02-215-4)

On Petition for Rehearing and Rehearing En Banc

Appellants filed petitions for rehearing and rehearing en banc.

The Panel voted to deny rehearing.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of the judges in active service in favor of rehearing en banc. Judge Widener voted to rehear the case en banc, and Judges Niemeyer, Luttig, Michael, Motz, Traxler, Gregory, Shedd and Duncan voted against rehearing en banc. Chief Judge Wilkins and Judges Wilkinson, Williams and King are disqualified.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Michael for the Court.

For the Court,

/s/ Patricia S. Connor
Clerk

PUBLISHED

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MARY CASEL, Commissioner of Revenue; JOHN DOE, et al.; UNKNOWN OWNERS,

Defendants.

No. 03-1797

Appeal from the United States District Court
for the Western District of Virginia, at Danville.
Jackson L. Kiser, Senior District Judge.
(CA-02-215-4)

Argued: September 25, 2003

Decided: March 22, 2004

Before NIEMEYER, MICHAEL, and MOTZ, Circuit Judges.

Affirmed by published opinion. Judge Michael wrote the opinion, in which Judge Niemeyer and Judge Motz joined.

COUNSEL

ARGUED: Joseph Thomas Waldo, WALDO & LYLE, P.C., Norfolk, Virginia; William B. Hopkins, Jr., MARTIN, HOPKINS &

LEMON, P.C., Roanoke, Virginia; Gary Michael Bowman, Roanoke, Virginia, for Appellants. Lela Merrell Hollabaugh, WALLER, LANSDEN, DORTCH & DAVIS, Nashville, Tennessee, for Appellee. **ON BRIEF:** Joseph L. Lyle, Jr., Jeremy P. Hopkins, WALDO & LYLE, P.C., Norfolk, Virginia; Allen Wayne Dudley, Jr., FURROW & DUDLEY, P.C., Rocky Mount, Virginia, for Appellants. Michael S. Mizell, WALLER, LANSDEN, DORTCH & DAVIS, Nashville, Tennessee, for Appellee.

OPINION

MICHAEL, Circuit Judge:

The Natural Gas Act (NGA or the Act), 15 U.S.C. § 717f(h), gives a gas company the power to acquire property by eminent domain, but the Act does not provide for immediate possession, that is, possession before just compensation is determined and paid in a condemnation action. The main question in this appeal is whether a gas company can obtain immediate possession through the equitable remedy of a preliminary injunction. We hold that it can. We also hold that the district court properly granted preliminary injunctive relief to the gas company in the several cases consolidated in this appeal; we therefore affirm the injunction orders.

I.

East Tennessee Natural Gas Company (ETNG) is a regional gas transportation company. Several years ago the company developed plans for what it calls the Patriot Project, a project to construct an interstate gas pipeline, twenty-four inches in diameter and about ninety-four miles long, through portions of Tennessee, Virginia, and North Carolina. Before a gas company like ETNG can build and operate a new pipeline, it must obtain a certificate of public convenience and necessity from the Federal Energy Regulatory Commission (FERC or the Commission). The procedure for obtaining a certificate from FERC is set forth in the NGA, 15 U.S.C. § 717 *et seq.*, and its implementing regulations, 18 C.F.R. § 157.1 *et seq.* The process begins with an application from the gas company that includes,

among other information, (1) a description of the proposed pipeline project, (2) a statement of the facts showing why the project is required, and (3) the estimated beginning and completion date for the project. 15 U.S.C. § 717f(d); 18 C.F.R. § 157.6(b). Notice of the application is filed in the Federal Register, 15 U.S.C. § 157.9, public comment and protest is allowed, *id.* § 157.10, and FERC conducts a public hearing on the application, *id.* § 157.11. As part of its evaluation, FERC must also investigate the environmental consequences of the proposed project and issue an environmental impact statement. *See* 42 U.S.C. § 4332. At the end of the process FERC issues a certificate if it finds that the proposed project "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). In its order issuing a certificate, FERC specifies a date for the completion of construction and the start of service. 18 C.F.R. § 157.20(b). The certificate may include any terms and conditions that FERC deems "required by the public convenience and necessity." *Id.* § 157.20. Once FERC has issued a certificate, the NGA empowers the certificate holder to exercise "the right of eminent domain" over any lands needed for the project. 15 U.S.C. § 717f(h).

On July 26, 2001, ETNG filed its application for a certificate of public convenience and necessity for the Patriot Project. *See Preliminary Determination of Non-Environmental Issues* 1, 98 FERC ¶ 61331, 2002 WL 471183 (2002). Notice of the application was published in the Federal Register on August 9, 2001. *Id.* at 4. Thereafter, approximately 200 interested parties submitted comments or protests, *id.* at 4, appendix, and FERC held several public hearings on the application. FERC released its preliminary determination on March 27, 2002. In this document, which did not cover environmental issues, the Commission found that the Patriot Project would help satisfy the growing energy needs in portions of the three-state area of Tennessee, Virginia, and North Carolina. Specifically, the project would supply gas to new electric generation plants, meet the needs of local utilities for additional gas, and bring gas service to portions of southwestern Virginia for the first time. *Id.* at 15. The preliminary determination also noted that "there may be some adverse impacts on landowners from the construction of the project." *Id.* After weighing these and other factors, FERC concluded that, subject to consideration of environmental issues, the public benefits of the Patriot Project would outweigh any adverse impacts. *Id.* at 1. The Commission then moved to

the environmental review process. Again, the public and interested parties were invited to submit comments and to participate in public meetings. *Order Denying Re-hearing, Authorizing Abandonment, and Issuing Certificate* 13-14, 101 FERC ¶ 61188, 2002 WL 31973796 (2002). On September 22, 2003, the Commission issued its final environmental impact statement (FEIS). *Id.* at 14. The FEIS recommended a number of mitigation measures that ETNG should take to avoid or minimize environmental damage. *Id.* at 14-19. In the end, the FEIS concluded that construction and operation of the Patriot Project would result in limited adverse environmental impacts. *Id.* at 30.

FERC's sixteen-month review of ETNG's application ended on November 20, 2002, when the Commission by formal order issued ETNG a certificate of public convenience and necessity. *Id.* at 1. The FERC order confirms that "[i]ssuance of the certificate . . . permits [ETNG] to acquire land for the pipeline by eminent domain, if it cannot reach agreement with the owner of land authorized." *Id.* at 20. The order requires ETNG to complete construction and make the pipeline available for service by January 1, 2005. *Id.* at 31. As the FEIS recommended, the certificate incorporates sixty-nine conditions that ETNG has to meet during construction. *Id.* at 31-44. Among other things, the conditions require ETNG to: (1) file weekly status reports with FERC during construction, (2) follow the mitigation measures described in the environmental impact statement, (3) employ environmental inspectors to monitor compliance with the mitigation measures, (4) monitor vegetation for at least two growing seasons following the completion of the project, and (5) limit construction to daylight hours.

As soon as FERC issued the certificate to ETNG, the company pursued negotiations with the affected landowners to acquire the easements to construct, operate, and maintain the new pipeline. The line will cross over 1,300 tracts of land in Tennessee, Virginia, and North Carolina. Through negotiations with landowners and a limited amount of condemnation litigation in North Carolina and Tennessee, the company was able to acquire over ninety percent of the right-of-way. That left about 130 tracts in Virginia where easements were still needed. In December 2002 ETNG filed 133 actions in the Western District of Virginia seeking orders of condemnation for the easements over the remaining tracts. Within a couple of months of filing the condemna-

tion actions, ETNG was able to settle with the owners of almost fifty of these tracts, leaving eighty-five or so that were still the subject of *litigation*.

At the same time ETNG filed the condemnation actions, it filed motions for immediate possession of the easements to prevent delays in construction. The NGA's eminent domain provision is silent on the question of immediate possession, so ETNG contended that the district court could use its "inherent equitable power" to grant this relief. J.A. 22 (joint appendix references are to case no. 03-1708(L)). The landowners filed answers challenging the breadth of ETNG's right to condemn, and they opposed the motions for immediate possession. The district court decided to deal with the litigation in stages, dealing first with the questions about ETNG's right to take. Thereafter, if required, the court would consider the motions for immediate possession, leaving the issue of just compensation in each case for last.

On May 8, 2003, the district court issued several identical opinions holding that ETNG could exercise the right of eminent domain to acquire the necessary easements through the tracts in litigation. In supplemental opinions filed June 6, 2003, the court explained its decision to grant ETNG's motions for immediate possession. The court acknowledged that there is no provision for immediate possession in the NGA. Nevertheless, the court held that it could "use its equitable powers to grant early possession to ETNG in the form of a preliminary injunction." J.A. 76. The court found that ETNG had established its right to immediate possession by satisfying the standards required for a preliminary injunction under *Blackwelder Furniture Co. of Statesville, Inc. v. Selig*, 550 F.2d 185 (4th Cir. 1977). Among other things, the court found that holding up "the project's completion until the compensation for the last parcel is determined" would result in an extended delay. J.A. 78. This delay, the court said, would cause significant financial harm to ETNG and its potential customers. On the other hand, the court found that harm to the landowners would be slight, especially because they had the "right to draw down the money ETNG has deposited with the Court based on [the company's] appraisal." J.A. 78-79. Finally, the court concluded that "expeditious completion of the pipeline is in the public interest." J.A. 79.

The landowners, in several cases that we have consolidated, appeal the district court's preliminary injunction orders granting immediate

possession. The landowners' main argument is that ETNG cannot take possession prior to the determination of just compensation. (The landowners now concede that ETNG has a legal right to take the property.) They further argue that even if the district court had the power to award immediate possession by preliminary injunction, the court erred in granting injunctions in these cases. Finally, some of the landowners claim that the district court lacked jurisdiction over their cases because the complaints did not sufficiently identify the property to be taken.

II.

A.

The first question is whether the district court can use its equitable power to order immediate possession in a condemnation case. We begin our discussion by reviewing the mechanics of how the federal power of eminent domain is usually exercised. Congressional authorization is required for land to be condemned by the government for public use. *See United States v. N. Am. Transp. Co.*, 253 U.S. 330, 333-34 (1920); 1A J. Sackman, Nichols on Eminent Domain § 3.03[1] (rev. 3d ed.). Congress sometimes exercises the power of eminent domain directly by enacting a statute that appropriates specific property. *See Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 5 (1984). Congress's normal practice, however, is to delegate the power of eminent domain to government officers who may condemn property in the name of the United States for public use. And Congress may, as it did in the NGA, grant condemnation power to "private corporations . . . execut[ing] works in which the public is interested." *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878). Although the federal statutes conferring the power of eminent domain routinely identify the officer who may exercise the power and the purpose for which it may be exercised, the statutes typically do not prescribe the procedural methods or steps for exercising the power. *See, e.g.*, 10 U.S.C. § 2663(a) ("Secretary of a military department may . . . acquire by condemnation any interest in land . . . needed for the site, construction, or operation of fortifications, coast defenses, or military training camps"); 16 U.S.C. § 404c-11 ("The Secretary of the Interior is authorized in his discretion to acquire for inclusion within the Mammoth Cave National Park by . . . condemnation . . . any lands

. . . within the maximum boundaries as authorized by . . . this title."); *see also Kirby*, 467 U.S. 1, 3 n.1 (1984). When a condemnation action becomes necessary, a government official has two statutory methods available for exercising the power of eminent domain. Under the first method, called "straight condemnation," the action usually proceeds to a determination of just compensation and final judgment before the condemnor takes possession. *See* 40 U.S.C. § 3113 (formerly codified at 40 U.S.C. § 257); *Kirby*, 467 U.S. at 3-4. Under the second method, often referred to as "quick-take," the government may take possession of the condemned property at the beginning of the case. *See, e.g.*, 40 U.S.C. § 3114 (formerly codified at 40 U.S.C. § 258a).

In straight condemnation the government official requests the Attorney General to initiate the condemnation action in district court. 40 U.S.C. § 3113. A special rule, Fed. R. Civ. P. 71A, governs the procedure in a condemnation action. *See Kirby*, 467 U.S. at 3-4. Under Rule 71A the complaint must set forth the authority for the taking, the use for which the property is being taken, the identity of the property, and the interest to be acquired. Fed. R. Civ. P. 71A(c)(2). After the complaint is filed, the action proceeds in due course to the determination of just compensation for the owner of the land. *Id.* § 71A(h). Rule 71A does not contain procedures for dealing with issues of pre-judgment possession by the condemning authority. Under traditional procedures, however, the condemning authority takes possession of the property after the determination and payment of just compensation. *See Kirby*, 467 U.S. at 4; 6 Nichols, *supra*, § 24.10[1]. As the Supreme Court indicated in *Kirby*, when just compensation is determined first, "[t]he practical effect . . . is to give the government an option to buy the property at the adjudicated price. If the government wishes to exercise that option, it tenders payment to the private owner, whereupon title and right to possession vest in the United States." *Kirby*, 467 U.S. at 4 (citation omitted). On the other hand, "[i]f the government decides not to exercise its option, it can move for dismissal of the condemnation action." *Id. See also* Fed. R. Civ. P. 71(A)(i)(3).

The second method of taking, prescribed mainly in the Declaration of Taking Act (DTA), provides the government with a more expeditious procedure. 40 U.S.C. § 3114. The DTA's quick-take provisions authorize the government to take immediate possession of condemned

property.* When the government proceeds under the DTA, it files a "declaration of taking" that, among other things, states the authority for the taking, states the public use for which the land is taken, and provides an estimate of just compensation. Once the government deposits the estimated amount with the court, "to the use of the persons entitled to the compensation," title to the condemned property automatically vests in the United States. *Id.* § 3114(a), (b); *Kirby*, 467 U.S. at 4-5. While the DTA gives the government the right of immediate possession, the time and terms of possession are fixed by the district court. 40 U.S.C. § 3114(d)(1). The precise compensation figure is determined later. ETNG did not try to use DTA's quick-take provisions, presumably because the statute only applies to condemnation proceedings "brought by and in the name of the United States." *Id.* § 3114(a).

The Natural Gas Act, like most statutes giving condemnation authority to government officials or private concerns, contains no provision for quick-take or immediate possession. The Act simply says that any holder of a certificate of public convenience and necessity may acquire property "by the exercise of eminent domain in the district court." 15 U.S.C. § 717f(h). The Act further provides that "the practice and procedure in any action or proceeding for that purpose . . . shall conform . . . with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated." *Id.* Courts, including the district court here, agree that this state

*The DTA gives any government official with condemnation authority the right to take immediate possession. A few statutes give this right to specific officials. *See, e.g.*, 42 U.S.C. § 5196(i)(1) (Director of the Federal Emergency Management Agency may "procure by condemnation or otherwise . . . materials and facilities for emergency preparedness, with the right to take immediate possession thereof"); 33 U.S.C. § 594 (when Secretary of Army is authorized to take lands necessary for harbor improvements, he "shall have the right to take immediate possession"); *see also* 10 U.S.C. § 2663(b) ("In time of war or when war is imminent, the United States may, immediately upon the filing of a petition for condemnation . . . take and use the land to the extent of the interest sought to be acquired."). These scattered statutes appear to be superfluous to the extent they confer the right of immediate possession, unless they allow an even more expeditious process than the DTA. That is not an issue for today, however.

procedure requirement has been superseded by Rule 71A. *See N. Border Pipeline Co. v. 64.111 Acres of Land*, 344 F.3d 693 (7th Cir. 2003); *S. Natural Gas Co. v. Land, Cullman County*, 197 F.3d 1368, 1374 (11th Cir. 1999); *see also Kirby*, 467 U.S. at 4 n.2. As we have said, Rule 71A does not provide procedures for allowing early possession. The Advisory Committee that drafted Rule 71A was well aware of the statutes (the DTA was the main one) giving the government the right of immediate possession. The committee considered, but decided against, including procedures in Rule 71A for exercising this right. According to the committee, "the procedure . . . being followed [to allow immediate possession] seems to be giving no trouble, and to draft a rule to fit all the statutes on the subject might create confusion." Fed. R. Civ. P. 71A advisory committee's supplementary report, 11 F.R.D. 222, 228 (Mar. 1951). Rule 71A thus contains no language that prohibits a condemnor from pursuing any available procedures to obtain possession prior to the entry of final judgment. These procedures could include an application for a preliminary injunction under Rule 65(a) because the regular rules of civil procedure apply when Rule 71A is silent. *See* Fed. R. Civ. P. 71A(a).

In any event, if the proceedings in the eighty-five separate cases here had taken their normal course under Rule 71A, ETNG would not have been able to enter each tract until just compensation was determined and paid on that tract. ETNG asserted that determining just compensation first would cause great delay in construction and in placing the pipeline in operation. In order to avoid this delay, ETNG filed its motions for immediate possession, contending that it met the standards for a preliminary injunction. The statute (the NGA) that gives it the power to condemn is silent on the issue of immediate possession, and the company did not seek to assert quick-take authority under the DTA. Thus, the specific question raised before the district court, and now presented on appeal, is whether a court may use its equitable powers to grant a preliminary injunction allowing immediate possession when there is no provision for that relief in the NGA or Rule 71A.

B.

A federal court has the power to grant equitable relief, *see Gordon v. Washington*, 295 U.S. 30, 36 (1935), but this power is circum-

scribed by the venerable principle that "equity follows the law," *Hedges v. Dixon County*, 150 U.S. 182, 192 (1893). Equity, in other words, may not be used to create new substantive rights. *See, e.g., Norwest Bank of Worthington v. Ahlers*, 485 U.S. 197, 206-07 (1988). However, when a substantive right exists, an equitable remedy may be fashioned to give effect to that right if the prescribed legal remedies are inadequate. *See Berdie v. Kurtz*, 88 F.2d 158, 159 (9th Cir. 1937); *Am. Brake Shoe & Foundry Co. v. N.Y. Rys. Co.*, 293 F. 633, 637-38 (2d. Cir. 1923). The district court followed these principles when it granted ETNG equitable relief in the form of a preliminary injunction that allowed the company to take early possession of the condemned property.

The district court discharged its duty to adjudicate these cases by first taking up the question of whether ETNG had a substantive right to condemn the landowners' property. After considering the briefs of the parties and hearing oral argument, the court issued orders determining that "ETNG has established its right to exercise eminent domain over the [landowners'] property as outlined in the [c]ertificate [of public convenience and necessity issued by FERC]." J.A. 74. These orders gave ETNG an interest in the landowners' property that could be protected in equity if the conditions for granting equitable (in this case, injunctive) relief were satisfied. *See Seymour v. Freer*, 75 U.S. 202, 213-14 (1868)(when a party has an interest in property "distinct from legal ownership," that interest "constitute[s] an equity which a court of equity will protect and enforce"). Therefore, once ETNG's right to take the easements was determined, it was proper for the district court to consider ETNG's motions for equitable relief in the various cases, specifically, its requests for preliminary injunctions granting immediate possession. As the discussion in part III, *infra*, establishes, the district court carefully considered the requirements for granting a preliminary injunction. A preliminary injunction is, of course, "appropriate to grant intermediate relief of the same character as that which may be granted finally." *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 220 (1945). *See also In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir. 2003). The district court's holding that ETNG had established its right to condemn meant that it would have been entitled to possession upon the entry of final judgment. Because the court found that the requirements for a preliminary injunction had been met, the court granted immediate posses-

sion to ETNG as a form of intermediate relief. Again, the district court followed established principles and procedures in granting equitable relief. The landowners argue that general principles of equity are inapplicable here because equitable relief in the form of immediate possession is barred in a condemnation case. We disagree.

To begin with, the Constitution does not prevent a condemnor from taking possession of property before just compensation is determined and paid. As the Supreme Court said a long time ago, the Constitution "does not provide or require that compensation be paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain, and adequate provision for obtaining compensation before his occupancy is disturbed." *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890). Rule 71A provides the procedure for determining just compensation, and ETNG has deposited cash with the court in an amount equal to the appraised value of the interests condemned. If the deposit is somehow short, ETNG will be able to make up the difference. In 2002 ENTG's parent company reported earnings of $1.17 billion from its natural gas transmission division that includes ETNG. There is thus adequate assurance that the landowners will receive their just compensation. *See Wash. Metro. Area Transit Auth. v. One Parcel of Land*, 706 F.2d 1312, 1321 (4th Cir. 1983) (fact that agency could be sued and had substantial assets was sufficient to assure just compensation).

The landowners argue that Congress does not intend for gas companies to gain immediate possession because it has not granted statutory quick-take power to gas companies as it has to government officers who condemn property in the name of the United States. This argument overlooks the preliminary injunction remedy provided in the Federal Rules of Civil Procedure that were adopted with the tacit approval of Congress. *See* 28 U.S.C. §§ 2072, 2074. Two rules are pertinent, Rule 65(a) and Rule 71A. Rule 65(a), which specifically allows for preliminary injunctions, was adopted with the original rules in 1937. Rule 71A, the special rule for condemnation actions, came along later, in 1951. As we have already mentioned, Rule 71A does not include any provisions governing the exercise of immediate possession. Rule 71A provides, however, that the regular rules of procedure apply to any subject not covered by the special rule. Fed. R. Civ. P. 71A(a). Under the rules, then, a gas company with condemnation

power under the NGA may apply under Rule 65(a) for a preliminary injunction awarding immediate possession. The gas company must, of course, establish that it is entitled to equitable relief. Congress has never given any indication that it disapproves of this procedure. Indeed, because Congress has not acted to restrict the availability of Rule 65(a)'s equitable (injunctive) remedy in an NGA condemnation, we conclude that the rule applies. *See Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 291 (1960) ("Equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command.").

The subtext of the landowners' argument that only Congress can grant the right of immediate possession is this: the preliminary injunction process does not provide the landowner with procedural safeguards that are comparable to those provided by Congress in the DTA. We disagree. Although the procedural safeguards in the preliminary injunction process are not a perfect match with those in the DTA, a comparison shows that the landowner is adequately protected when the condemnor obtains immediate possession under either procedure. In a DTA case the government exercises its right to immediate possession with minimal judicial oversight. Title and the right to possession vest in the government immediately upon the filing of a declaration and the requisite deposit. *See* 40 U.S.C. § 3114; *Kirby*, 467 U.S. at 4-5. Although the district court fixes the time and any terms of the possession, the government takes possession of the condemned property as a matter of course, unless the landowner or occupant demonstrates some undue hardship that warrants a delay. *See, e.g., United States v. Certain Land in the Borough of Manhattan*, 332 F.2d 679, 680-82 (2d Cir. 1964) (possession delayed when government sought to oust tenants on five days' notice); *United States v. 6,576.27 Acres of Land*, 77 F.Supp. 244, 246 (D. N.D. 1948) (eviction delayed when "it would be difficult, if not impossible, for . . . farm families to move by the date fixed in the order"). In a condemnation case under the NGA, a gas company that seeks immediate possession has a much stiffer burden than the government does under the DTA. Because title in an NGA case does not pass until compensation is determined and paid, *see Danforth v. United States*, 308 U.S. 271, 284-85 (1939), the company's motion for immediate possession triggers a threshold requirement. The district court must determine that the company has the right to condemn the property in question. *See*

Guardian Pipeline, L.L.C. v. 950.80 Acres of Land, 210 F.Supp.2d 299, 301 (N.D. Ill. 2002). Once the right to condemn is established by court order, it follows that the company will be entitled to possession when title is transferred at the end of the case. The question then becomes whether the relief that will be appropriate at the end (that is, possession) should be granted at an earlier stage. To obtain this intermediate relief, the gas company must satisfy the strict requirements for a preliminary injunction. For example, the company must demonstrate that it will suffer irreparable harm without immediate possession, and the company's harm must be weighed against any harm to the landowner. *See Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846, 859 (4th Cir. 2001). In this case ETNG was awarded possession only after it engaged in five months of intensive litigation that analyzed and determined its right to take and its right to equitable relief (an injunction).

In comparing the protections of the DTA to those in injunction proceedings, we return briefly to the matter of title and the payment of just compensation. Again, title passes immediately to the government under the DTA. There is the possibility, of course, that the government, in making its deposit to cover compensation, will underestimate the value of the land. In that case, the landowner is protected because the government undertakes to pay the difference between the adjudicated value of the land and the deposit. *Kirby*, 467 U.S. at 5. In an NGA condemnation where early possession is granted to a gas company, the landowner is protected in a different way, that is, by "the rule that title does not pass until just compensation has been ascertained and paid." *Danforth*, 308 U.S. at 284-85. Therefore, if the gas company's deposit (or bond) is less than the final compensation awarded, and the company fails to pay the difference within a reasonable time, "it will become a trespasser, and liable to be proceeded against as such." *Cherokee Nation*, 135 U.S. at 660. Likewise, if a FERC-regulated gas company was somehow permitted to abandon a pipeline project (and possession) in the midst of a condemnation proceeding, the company would be liable to the landowner for the time it occupied the land and for any "damages resulting to the [land] and to fixtures and improvements, or for the cost of restoration." 4 J. Sackman, Nichols on Eminent Domain § 12E.01[07] (rev. 3d ed). *See also* Fed. R. Civ. P. 71A(i)(3) (district court "shall not dismiss [condemnation] action as to any part of the property of which the plaintiff

has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest taken"). For all of these reasons, we conclude that when a gas company initiating a condemnation action under the NGA seeks immediate possession by preliminary injunction, there are sufficient safeguards in place to protect the landowner.

The landowners also argue that because statutes granting the power of eminent domain must be strictly construed, equity cannot be invoked to supply the remedy of immediate possession. This argument is rooted in the principle that "[t]he grant of authority to condemn for specific purposes must be construed as limited to the enumerated purposes." 1A Nichols, *supra*, § 3.03[3][d]. The property in this case is being condemned for the strict purpose authorized by the NGA, to build a pipeline that FERC deems necessary to supply natural gas. Moreover, our circuit has never interpreted the strict construction principle to mean that equity cannot allow for the possession of property condemned under the NGA before a case is finally ended. In *Atlantic Seaboard Corp. v. Van Sterkenburg*, 318 F.2d 455 (4th Cir. 1963), a natural gas company sought possession of an easement for a new pipeline while the landowner appealed his award of just compensation. The district court authorized possession conditioned on the company's deposit of the award into the court's registry account. The landowner also appealed the order granting possession, arguing that Rule 71A did not authorize the district court to provide such relief. Our court recognized that Rule 71A did not spell out procedures for the grant of early possession. Nevertheless, our court said that "inherently, the condemnation court possesses the power to authorize immediate entry by the condemnor upon the condemned premises." *Id.* at 460. In upholding the order of early possession, our court observed that a landowner, protected by a deposit, should not be allowed "to postpone the condemnor's enjoyment of the premises, imposing upon the condemnor great, perhaps irreparable damage, all without risk of further loss or injury to the owner." *Id.* We recognize, of course, that the *Atlantic Seaboard* case was much further along than today's case when possession was authorized. Nevertheless, *Atlantic Seaboard* demonstrates that a court may use its equitable power to authorize early possession.

Finally, the landowners' argument that equity cannot be invoked here ignores the fact that there is a substantial public interest — the

need for natural gas supply — at stake in this case. As the Supreme Court has said, courts of equity may go to greater lengths to give "relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Va. Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937). *See also United States v. Morgan*, 307 U.S. 183, 194 (1939); *United States ex rel. Rahman v. Oncology Assocs., P.C.*, 198 F.3d 489, 497 (4th Cir. 1999). FERC spent sixteen months evaluating the need for the Patriot Project. Ultimately, it concluded that the project was required by the public convenience and necessity. It was therefore appropriate for the district court to weigh the public benefit of expeditious project construction in deciding that it could use its equitable power in this case.

District courts in a number of jurisdictions have done exactly what the district court did here, that is, grant immediate possession in the form of a preliminary injunction to a gas company that has established its right to condemn under the NGA. *See Northwest Pipeline Corp. v. The 20' by 1,430' Pipeline Right of Way*, 197 F.Supp.2d 1241, 1245 (E.D. Wash. 2002)("[w]here there is no dispute about the validity of [the gas company's] actual right to the easement," denying authority to grant immediate possession "would produce an absurd result"); *Guardian Pipeline, L.L.C. v. 950.80 Acres of Land*, 210 F.Supp.2d 976, 979 (N.D. Ill. 2002)(immediate possession proper when condemnation order has been entered and preliminary injunction standards have been satisfied); *N. Border Pipeline Co. v. 64.111 Acres of Land*, 125 F.Supp.2d 299, 301 (N.D. Ill. 2000)(same); *see also N. Border Pipeline Co. v. 127.79 Acres of Land*, 520 F.Supp. 170, 173 (D. N.D. 1981) ("the Court believes the circumstances of this case warrant the exercise of inherent powers"); *Williston Basin Interstate Pipeline Co. v. Easement and Right-of-Way Across .152 Acres of Land*, 2003 WL 21524816 (D. N.D. 2003)(same); *Tenn. Gas Pipeline Co. v. New England Power, Inc.*, 6 F.Supp.2d 102, 104 (D. Mass. 1998)(same); *USG Pipeline Co. v. 1.74 Acres*, 1 F.Supp.2d 816, 825-26 (E.D. Tenn. 1998)(same); *Kern River Gas Transmission Co. v. Clark County*, 757 F.Supp. 1110, 1117 (D. Nev. 1990)(same); *Humphries v. Williams Natural Gas Co.*, 48 F.Supp.2d 1276, 1280 (D. Kan. 1999)("[I]t is apparently well settled that the district court does have the equitable power to grant immediate entry and possession [under the NGA]."); *Rivers Electric Co., Inc. v 4.6 Acres of Land*, 731 F.Supp. 83, 87 (N.D. N.Y. 1990)(granting immediate pos-

session under a statute similar to the NGA). *Cf. Commercial Station Post Office, Inc. v. United States*, 48 F.2d 183, 184-85 (8th Cir. 1931)(holding that government officer who exercises statutory authority to file condemnation action may take immediate possession of the property even though there is no express provision authorizing pre-judgment possession).

One circuit case, *Northern Border Pipeline Co. v. 86.72 Acres of Land*, 144 F.3d 469 (7th Cir. 1998), has held that a district court lacked authority to grant a condemnor immediate possession under the NGA. But that case involved an entirely different set of circumstances than those presented here. Specifically, the gas company in *Northern Border* did not obtain an order determining that it had the right to condemn before it sought a preliminary injunction. Its motion for an injunction was based entirely on the existence of a certificate of public convenience and necessity. Under those circumstances, the Seventh Circuit held that the gas company had no right to equitable relief because the company "did not present an argument grounded in substantive law establishing a preexisting entitlement to the property." *Id.* at 472. Two district court decisions in the Seventh Circuit have interpreted *Northern Border* to mean that immediate possession is improper only when there has been no order confirming the right to condemn. *N. Border Pipeline Co. v. 64.111 Acres of Land*, 125 F.Supp.2d 299, 301 (N.D. Ill. 2000)("in this case, plaintiff does have a preexisting entitlement to the easements, the judgments of condemnation, which make an award of possession appropriate"); *Guardian Pipeline, L.L.C. v. 950.80 Acres of Land*, 210 F.Supp.2d 976, 979 (N.D. Ill. 2002)(same). We agree with the assessment of the two district courts. The gas company in *Northern Border* had simply failed to seek an order determining that it had the right to condemn. Without having that right in substantive law determined, the company could not invoke equity.

In summary, the district court followed established principles of equity in determining that it had the power to award preliminary injunctive relief to ETNG in the form of immediate possession. Neither the Constitution, nor Congress, nor Rule 71A bars this sort of relief in a condemnation case. In this case, the public interest factor — the need for natural gas in a region with little or no service — made it especially appropriate for the district court to consider equita-

ble relief that would allow expeditious construction of the pipeline. A number of district courts around the country have also determined that they have the equitable power to grant immediate possession to a gas company filing a condemnation action under the NGA. We agree with this position. Accordingly, we hold that once a district court determines that a gas company has the substantive right to condemn property under the NGA, the court may exercise equitable power to grant the remedy of immediate possession through the issuance of a preliminary injunction.

III.

Because the district court had the authority to grant immediate possession through a preliminary injunction, we must consider the landowners' alternative argument that ETNG does not satisfy the basic requirements for a preliminary injunction. We review the decision to grant a preliminary injunction for abuse of discretion. Factual determinations are reviewed for clear error and legal conclusions de novo. *Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846, 859 (4th Cir. 2001). In deciding whether to grant a preliminary injunction, a court should consider (1) the likelihood of irreparable harm to the plaintiff if the injunction is denied, (2) the likelihood of harm to the defendant if the injunction is granted, (3) the likelihood that the plaintiff will succeed on the merits, and (4) the public interest. *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 193-96 (4th Cir. 1977). The district court issued preliminary injunction orders that mandated affirmative relief (immediate possession) to ETNG. We have said that "[m]andatory preliminary injunctions do not preserve the status quo and normally should be granted only in those circumstances when the exigencies of the situation demand such relief." *Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir. 1980). *See also In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir. 2003). We will now review the district court's preliminary injunction decision, starting with the *Blackwelder* factors.

1. *The likelihood of irreparable harm to ETNG.*

The district court found that without a preliminary injunction the Patriot Project would suffer "undue delay" and that this delay would cause "significant financial harm both to ETNG and some of its puta-

tive customers." J.A. 78. This finding has ample support in the record. The court pointed out that separate hearings on compensation would be required for each of the eighty-five tracts involved. Scheduling and conducting those hearings, the district court noted, "will obviously take an extended period of time." J.A. 78. ETNG estimated that if possession on some tracts was deferred until completion of the hearings, construction could be delayed until the Summer of 2004 or beyond. Constructing a ninety-four-mile pipeline is a complex project that can only progress in phases. Certain portions of the project have to be completed before construction can begin on other portions. Therefore, as the district court recognized, "any single parcel has the potential of holding up the entire project." J.A. 78. Continuing, the court said, "[t]o require ETNG to build up to a parcel of land [it] do[es] not possess, skip that parcel, and then continue on the other side would prove wasteful and inefficient." *Id.* Furthermore, ETNG is under an order from FERC to complete construction and have the pipeline in operation by January 1, 2005. It would not be possible to meet FERC's deadline without a preliminary injunction.

ETNG is also under contractual obligation to provide natural gas to several electric generation plants and local gas utilities by certain dates. Without a preliminary injunction, ETNG would be forced to breach these contracts. ETNG's inability to satisfy these commitments would have negative impacts on its customers and the consumers they serve. For example, two electric generation plants will not be able to operate at full capacity without natural gas from the Patriot Project. A North Carolina gas utility may not be able to meet its customers' demand for gas if ETNG does not complete the project on time. ETNG estimates that it would lose in excess of $5 million if construction delay caused it to breach its contractual obligations to supply gas. Finally, delay in the construction of the pipeline would hinder economic development efforts in several Virginia counties.

2. *The likelihood of harm to the landowners.*

The landowners claim that ETNG's early possession will disturb the productive capacity of their land. This is simply a timing argument because productive capacity would still be disturbed, albeit at a later time, if just compensation was determined first. In any event, as the district court observed, the early loss of use argument "is

blunted by [the landowners'] right to draw down the money ETNG has deposited with the Court based on ETNG's appraisal," that is, an independent appraisal obtained by the company. J.A. 78-79. The landowners also argue that by awarding ETNG early possession, the district court undermined their ability to negotiate a favorable price for their land. This argument is unconvincing because the Fifth Amendment guarantees the landowners just compensation for their land no matter when the condemnor takes possession. Finally, the landowners argue that taking property before determining just compensation constitutes a type of inherent harm that is irreparable, especially when lands have been held in the same family for many years. We fully understand that condemnation often forces landowners to part with land that they would prefer to keep for many reasons, including sentimental ones. However, the Supreme Court long ago recognized that "in view of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it . . . is properly treated as part of the burden of common citizenship." *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949). In the end, the district court concluded that the harm to the landowners due to early possession is "slight at best." J.A. 79. The record supports this conclusion, and any harm to the landowners is clearly outweighed by ETNG's immediate need for the property.

3. *The likelihood that ETNG will succeed on the merits.*

ETNG has a determination on the merits that it has a right to condemn the landowners' property, and the landowners now concede that ETNG possesses this right. Success on the merits for ETNG is therefore apparent.

4. *The public interest.*

The district court concluded that "expeditious completion of the pipeline is in the public interest." J.A. 79. Congress passed the Natural Gas Act and gave gas companies condemnation power to insure that consumers would have access to an adequate supply of natural gas at reasonable prices. *Clark v. Gulf Oil Corp.*, 570 F.2d 1138, 1145-46 (3d Cir. 1977); *Fla. Power & Light Co. v. Federal Energy Regulatory Comm'n*, 598 F.2d 370, 379 (5th Cir. 1979); *Public Serv.*

Comm'n of Ky. v. Federal Energy Regulatory Comm'n, 610 F.2d 439, 442-43 (6th Cir. 1979). As the district court observed, FERC conducted a careful analysis of the Patriot Project and determined that the project will promote these congressional goals and serve the public interest. The project serves the public interest because, among other things, it will bring natural gas to portions of southwest Virginia for the first time. This will make gas available to consumers, and it will help in the efforts of local communities to attract much-needed new business. On a larger scale, the pipeline will make gas available for electric power generation plants. A delay in construction would postpone these benefits.

Because our review must be "more searching when the preliminary injunctive relief ordered by the district court is mandatory," *Microsoft Antitrust Litig.*, 333 F.3d at 525, we will consider whether the circumstances are sufficiently demanding for the award of mandatory relief. We conclude that they are. First, ETNG's right to take the easements for the Patriot Project is indisputably clear, as the district court determined. Second, a federal agency, FERC, determined that the project is necessary to serve the public interest, specifically, the public need for natural gas in areas that have no gas service or that are underserved. To assure that these needs are met in good time, FERC has ordered ETNG to complete the project by January 1, 2005. Third, ETNG could not meet FERC's deadline without immediate possession. And without this mandatory relief, ETNG would face other irreparable harm such as increased construction costs and losses from its breach of gas supply contracts. Preliminary injunctive relief of a mandatory nature was therefore appropriate in these cases.

After considering the *Blackwelder* factors and the propriety of mandatory relief, we conclude that the district court did not abuse its discretion in entering the preliminary injunction orders in these cases.

IV.

Some of the landowners argue that the district court lacked jurisdiction over their cases because ETNG's condemnation complaints did not sufficiently identify the property to be taken. Rule 71A(c)(2) requires a condemnation complaint to include "a description of the property sufficient for its identification." Fed. R. Civ. P. 71A(c)(2).

Each of ETNG's complaints provides a legal description of the tract of land through which the pipeline will run and a detailed plat showing the location of the easement. In instances where construction considerations have required a change in location, amended plats have been filed with the district court and provided to the landowners. All of this is sufficient to satisfy Rule 71A(c)(2) and any jurisdictional requirement relating to property descriptions. *See S. Natural Gas Co. v. Land, Cullman County*, 197 F.3d 1368, 1375 (11th Cir. 1999); *Guardian Pipeline, L.L.C. v. 529.42 Acres of Land*, 210 F.Supp.2d 971, 975 (N.D. Ill. 2002).

V.

In sum, we hold that once a district court determines that a gas company has the substantive right to condemn property under the NGA, the court may use its equitable power to grant the remedy of immediate possession through the issuance of a preliminary injunction. Because the district court did not abuse its discretion in granting preliminary injunctive relief to ETNG in these cases, we affirm the district court's orders.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

EAST TENNESSEE NATURAL GAS COMPANY,
Plaintiff,

v.

3.51 ACRES IN WYTHE COUNTY, et al.
Defendants.

Case No. 4:02CV00215
By: Jackson L. Kiser, Senior U.S. District Judge

ORDER

Before the court is the Plaintiff's Motion for Immediate Possession and several related motions from both the Plaintiff and certain Defendants. The parties have submitted briefs on the issues and oral argument has been heard, making the matter ripe for discussion. I hereby order that:

1. The Plaintiff's Motion for Immediate Possession is DEFERRED pending the court's determination of jurisdiction and other issues of law pertaining to the Plaintiffs' right to condemn the property;

2. The motion of Defendant 3.51 Acres in Wythe County [4:02cv00215] to:

A. Withdraw their Motion to join the Federal Energy Regulatory Commission ("FERC") as a third-party defendant is GRANTED;

B. Withdraw their Third Party Complaint against FERC is GRANTED;

3. All Motions for Change of Venue [Cases 4:02cv00219, 4:02cv00220, 4:02cv00225, and 4:02cv00227] are DENIED

4. The site for all hearings shall be Roanoke, Virginia or at such other places as may be convenient to the parties, and the location for all court filings shall remain in Danville, Virginia;

5. All cases will be bifurcated, with all issues pertaining to both the court's jurisdiction and the Plaintiff's power to condemn the Defendants' property to be determined first by the court. If it is determined that the Plaintiff can lawfully exercise the power of eminent domain, the issue of just compensation will then be determined. The Defendants' Motion for a Jury Trial is DENIED. Just compensation will be determined by a commission in accordance with Fed. R. Civ. P. 71A(h). A commission is preferable for the reasons stated into the record at the February 28, 2003 hearing — i.e., because of the number of parcels of land involved, the distance covered by the various parcels, and the need for consistency in the awards;

6. Oral argument on the legal issues surrounding the court's jurisdiction and the Plaintiff's power to condemn the property will be heard on April 10, 2003 at 9:30 a.m. in Roanoke;

7. The following scheduling order must be followed:

A: Defendants briefs in opposition to Plaintiff's Condemnation must be filed by March 13, 2003;

B. Plaintiff's Response must be filed by March 27, 2003;

C. Defendants' Replies must be filed by April 3, 2003.

The Clerk is directed to send a certified copy of this order to all counsel of record and to any pro se parties.

Entered this 4th day of March, 2003.

Jackson L. Kiser
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

EAST TENNESSEE NATURAL GAS COMPANY,
Plaintiff,

v.

3.51 ACRES IN WYTHE COUNTY,
Defendants.

Case No. 4:02CV00215
By: Jackson L. Kiser, Senior U.S. District Judge

ORDER

Before the court is Plaintiff's Motion for Possession pursuant to Fed. R. of Civ. P. 71a. For the reasons discussed in the accompanying memorandum, Plaintiff has established its right to exercise eminent domain over the defendants' property as outlined in the Certificate of Public Convenience and Necessity ("Certificate"), and therefore its motion is GRANTED contingent on the Plaintiff meeting the other requirements of this order.

The parcels of land are not fungible. Therefore, Plaintiff must prepare a separate order for each parcel of land that is subject to its Motion for Possession. The orders should grant Plaintiff's right to possession and should contain any requirements set forth in the Certificate that are unique to that parcel of land. The orders need not contain general requirements which are applicable to all parcels. The orders must be submitted to the court within 20 days from the date of this order with copies to counsel for the landowners and any pro se litigants. If a landowner has an

objection to the order as to its form or content, the objection must be filed in writing with the court within 10 days of the receipt of the proposed order.

The clerk is directed to send a certified copy of the Order and the accompanying Memorandum Opinion to all counsel of record and to any pro se defendants.

ENTERED this 8th day of May, 2003.

Jackson L. Kiser
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

EAST TENNESSEE NATURAL GAS COMPANY,
Plaintiff,

v.

3.51 ACRES IN WYTHE COUNTY,
Defendants.

Case No. 4:02CV00215
By: Jackson L. Kiser, Senior U.S. District Judge

MEMORANDUM OPINION

I. Factual Background

On November 22, 2002, the Federal Energy Regulatory Committee ("FERC") granted the petitioner, East Tennessee Natural Gas Company ("ETNG"), a Certificate of Public Convenience and Necessity ("Certificate") to construct an integrated interstate gas pipeline through eastern Tennessee and western Virginia. This endeavor, referred to as the "Patriot Project," authorizes the Installation of 93.6 miles of 24-inch diameter pipeline through Carroll, Floyd, Henry, Patrick, and Wythe Counties, Virginia. The Certificate was issued after a hearing was conducted by FERC after the statutorily required notice was given.

The Certificate thoroughly covers all of the procedures and conditions that ETNG must adhere to in constructing the pipeline, including:

1. Following procedures and mitigation measures outlined in its application and environmental impact statement;

2. Filing detailed alignment maps and aerial photographs of all proposed facility locations, route realignments, staging areas, pipe store yards, and new access not previously identified;

3. Filing an initial Implementation Plan with the Secretary describing how ETNG will implement FERC's mandates, including procedures for training and compliance;

4. Employing two environmental inspectors per spread on the Patriot Extension to monitor compliance with all requirements;

5. Filing weekly status reports with FERC listing status changes, problems and noncompliance encountered, and corrective actions;

6. Filing revised tables with FERC after surveying individual property tracts;

7. Survey land before blasting for structures that may be affected and giving landowners 24-hour notice of blasting;

8. Installing temporary erosion controls after disturbing soil;

9. Providing compaction testing of topsoil and subsoil;

10. Monitoring vegetation for at least two growing seasons.

11. Monitoring water quality and yield of wells within 150 feet of pipeline activities;

12. Ensuring property is cleaned and restored within ten days of backfilling of trench;

13. Planning for notification of landowners when their property is traversed and when testing is to be done and informing them of dates and procedures.

14. Limiting construction times to daylight hours;

15. Identifying septic systems, avoiding them where possible, and removing and replacing system when unable to avoid;

16. Limiting construction activities to the area of the permanent easement; and

17. Providing each landowner with a Construction Alignment Sheet showing the construction area and other pertinent information.

Certificate of Public Convenience and Necessity, Appendix 1-55. FERC also mandates that any changes other than "minor field realignments per landowner needs and requirements" be reported to the Secretary and receive review and approval by the Director of the Office of Energy Projects. Id. at 5.

After receiving the Certificate, ETNG immediately made a motion for possession on the land that it had been unable to acquire through negotiations. On December 12, 2002, ETNG moved for immediate possession, and the court heard oral arguments on the issue on February 28, 2003. On March 4, 2003, I entered an order taking the motion for immediate possession under advisement and bifurcating the

case to consider ETNG's right to condemnation first and then assign all compensation issues to a commission as allowed by Rule 71A. The parties were given deadlines to file brief dealing with the issue of the plaintiff's power to condemn and oral argument on the issue was heard on April 10, 2003. The sole purpose of this opinion is to address the plaintiff's right to condemn the defendants' property. While the court recognizes that these cases have not been consolidated, in the interest of judicial efficiency I have incorporated all claims into a single opinion.

II. Motion for Possession

The defendants' defenses to the plaintiff's case can be condensed to three major issues, one of which can be broken down further. First, they contend that the plaintiff's complaint is fatally defective in that it fails to adequately describe the property that is being condemned. Second, they argue that ETNG has failed to properly comply with substantive state law. Specifically, they state that the Plaintiff has (1) failed to follow Va. Code § 25-248 which mandates that landowners "be given an opportunity to accompany the appraiser during his inspection of the property; (2) that ETNG violated Va. Code § 25-46.5 by not giving the landowners written statements of the valuation process or a copy of the condemnor's appraisal; and (3) that ETNG has not bargained in good faith with the landowners as required by Va. Code § 25-46.5 and 15 U.S.C. § 717f(h). Finally, some of the defendants have offered individualized claims arguing that the court should change or enforce the duties established in the FERC Certificate, and at least one set of landowners contend that granting ETNG's motion for possession would violate the Takings Clause of the Fifth Amendment and their Due Process rights. I will address each of these claims in turn.

A. ETNG has failed to adequately describe property

Certain of the defendants contend that ETNG has not filed a properly pled complaint, which they argue is a "jurisdictional prerequisite" to this court's authority. They argue, quoting the state code and state case law, that ETNG is violating their clients due process rights by not being specific enough about the easements it is seeking.[1] To support their arguments, the defendants point to *United States v. Causby*, 328 U.S. 256, 267 (1945), the famous "airplanes over the chicken farm" case, which they point out states that "an accurate description of the property taken is essential." In that case, the Court disagreed with the Court of Claims contention that the government had taken an easement by allowing planes to fly over the defendant's property. The error, according to the Court, was that there was no findings made as to the altitude, frequency, type of aircraft, or whether the easement was temporary or permanent. The Court pointed to federal statutes that required findings of fact and concluded that it was "premature" for them to make a review of the Court of Claim's compensation award until they knew whether the easement was temporary or permanent.

The posture and timing of *Causby* make it easily differentiable from the case at hand. First, the Court did not find that there was any defect in the pleading, which it could not have since the Government had been the original defendants, but it only stated what findings the district court was required to make before establishing compensation. Second, this case took place six years before Congress

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[1]Note that this lack of specificity also plays into the defendants' defense that ETNG has not negotiated in good faith. The argument goes that no landowner can reasonably assess or reply to an offer unless they know what it is for.

adopted Rule 71A, which means that the statutes requiring specific factual findings have now been superceded.

The defendants admit that ETNG has included a surveyed plat map to give the specifics of the easement, but they claim it is deficient for the purpose because ETNG admits on the survey that the "actual location of easement is determined by the pipeline as installed." If the location is not definitely known, the defendants point out, then the landowners have not been given adequate notice. For example, the pipeline could be projected through unused, low-value land and could end up going through used, higher-valued land. They assert that since the claims fail to meet the jurisdictional requirements, the cases should be dismissed.

While there does not appear to be any Fourth Circuit precedent on this specific issue, other courts have decisively addressed it. In *Southern Natural Gas Co. v. Land, Cullman County*, 197 F.3d 1368, 1375 (11th Cir. 1999), the court held that a legal description of the property and a plat map showing the placement of the pipeline were sufficient to identify the property under Rule 71A(c)(2). *See Guardian Pipeline, L.L.C. v. 529.42 Acres of Land*, 210 F. Supp. 2d 971, 975 (N.D. Ill. 2002) ("[L]egal descriptions and plat maps easily satisfy the federal requirement that a condemnation complaint include a description for the property sufficient for its identification."). The proposed route of the pipeline was enough, even if the final easement was different. *See USG Pipeline Co. v. 1.74 Acres in Marion County, TN*, 1 F. Supp. 2d 816, 823, 825 (E.D. Tenn. 1998) (noting that gas company did not tell landowners "precisely where on their property the pipeline would run," yet finding no statutory authority to do so).

It would be illogical to assume that the pleading requirements would set a higher standard than the substantive statutory requirements of the "National Gas Act" ("NGA"). Also, I believe it is important to remember that part of the reason that ETNG cannot provide a more

specified determination of the location of the easements is due to the fact that the defendants have denied them the opportunity to survey their land to determine possible obstructions.

It is import to note that the landowners also are protected by the necessities of procedure. FERC has granted an easement to ETNG to lay pipeline across specific property. It is clear from the order that any changes to the proposed route or requirements will have to be approved by the Director of the Office of Energy Projects. To obtain a new easement, ETNG will have to start fresh, getting the approval of FERC, negotiating with the landowner, and then beginning a new condemnation proceeding if it is unable to come to terms with the landowner. As ETNG noted during the hearing, in that case the defendants will still receive their due process and will likely get paid twice for one pipeline.

B. Failure to comply with state substantive law

The question of whether state or federal law governs appears confusing, but I believe it is relatively easy to disentangle. The defendant's contend that Virginia has laid down statutory provisions to protect the rights of landowners. They further argue that these laws do not directly conflict with the implementation and purpose of the NGA, so they should be followed according to § 717f(h) of that Act which states: "[T]he practice and procedure in any action or proceeding for [the purpose of eminent domain] in the district of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated...." 29 U.S.C. § 717f(h). As such, the defendants claim that before it can successfully seek condemnation under Rule 71A, ETNG must follow Virginia law which requires, among other things, that the landowner be allowed to accompany the company's surveyor and that the

condemnor provide the landowner with a copy of the appraisal and explain how valuation was determined.[2]

While I can find no evidence of this or any other federal court addressing these specific statutory requirements, there is plenty of case law that disputes the defendants' assertion that ETNG must follow Virginia law. The defendants admit that Rule 71A preempts state procedural law, but they insist that state substantive law must be followed under the NGA. The question, then, is whether Rule 71A, which was enacted in 1951, supercedes the "practice and procedure" requirement of the earlier-enacted NGA. Case law clearly states that it does.

In *Kirby Forest Indus., Inc. v. U.S.*, 467 U.S. 1, 4 n.2 (1984), the U.S. Supreme Court held that Rule 71A superceded the Condemnation Act. Since that time, courts considering the issue have held the NGA to the same standard. *See Southern Natural Gas*, 197 F.3d at 1374 ("Rule 71A, not the practice and procedure language of § 717f(h) and not state law, governs the proceedings in the instant case); *Alabama Power Co. v. 1354.02 Acres, More or Less, of Land in Randolph County, Ala.*, 709 F.2d 666 (11th Cir. 1983); *USG Pipeline*, 1 F. Supp. 2d at 827; *see also* Rule 71A, Advisory Committee Notes (Rule 71A...supplants all statutes proscribing a different procedure."). As the court stated in *Guardian Pipeline*, "state and local laws cannot be used to prohibit or unreasonably delay the construction of the approved pipeline." 210 F. Supp. 2d at 975.

In considering the issue of whether defendants were entitled to a trial before a commission in accordance with

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[2]The defendants spent the majority of the rest of their brief explaining how by ignoring Virginia law the court would be creating improper federal common law. I believe that this argument only distracts from the true issue and its resolution.

Virginia law, the Fourth Circuit stated that "state law is made applicable only when no federal law is applicable." and the court found "no hiatus in federal law requiring resort to the laws of Virginia." *Washington Metro. Area Transit Auth. v. Two Parcels of Land in Fairfax County, Virginia*, 569 F.2d 816 (4th Cir. 1978). More recently, one district court from this circuit has stated that federal law "governs all procedural and most substantive matters arising in a federal condemnation proceeding." *United States v. 7,216.50 Acres of Land*, 507 F. Supp. 228, 235 (D.C.S.C. 1980). Other federal courts have considered the question of the application of state law under the NGA and have routinely held that clause has been preempted by Rule 71A. *See Southern National Gas Co. v. Land, Cullman County*, 197 F.3d 1368, 1372 (11th Cir. 1999); *Scully v. U.S.*, 409 F.2d 1061 (10th Cir. 1969)(stating that determination of type and extent of property interest taken upon exercise of federal power of eminent domain is governed by federal law); *Northwest Pipeline Corp. v. The 20' x 1,430' pipeline Right of Way easement*, 197 F. Supp. 2d 1241, 1244 (E.D. Wash. 2002) ("[T]he explicit language of the Natural Gas Act regarding the use of state law has been repealed by implication through the adoption of Rule 71A..."); *Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement*, 747 F. Supp. 401, 404 (N.D. Ohio 1990) ("The Court concludes that the State of Ohio has no power to regulate, directly or indirectly, a natural gas storage field certified by the Federal Energy Regulation Commission.").

In *Natural Gas Pipeline Co. Of America v. Iowa State Commerce Comm'n*, 369 F. Supp. 156 (S.D. Iowa 1974), the court considered a case with facts very similar to those presented here. In that case, a private gas company sought declaratory and injunctive relief against enforcement of a state statute that governed permit procedures for underground pipelines. The statute in question required all pipeline companies to hold informational hearings for all

affected landowners at least 30 days prior to requesting a permit from the State and prohibited negotiations for real estate before the hearings had taken place. The court determined that the State's informational meeting requirement could not apply to companies who were seeking eminent domain under federal procedures.[3] *Id.* at 160.

The defendants claim that by rejecting their argument that individual landowners must be given the opportunity to accompany ETNG appraisers, this court would be improperly establishing a federal common law instead of relying on state law. To support their argument, they rely on *Georgia Power Co. v. 138.30 Acres of Land*, 617 F.2d 1112 (5th Cir. 1980), and *Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement*, 962 F.2d 1192 (6th Cir. 1992), two cases in which the court reversed a district court's decision due to the fact that the judge-appointed commission had based its compensation valuation on federal common law and not the relevant state law. In each case the courts noted that the statute did not specify the proper rule of decision and iterated that it was thus the duty of the judiciary to formulate a usable valuation policy. Relying on the principles of federalism, the courts determined that state law should be used "unless it is shown that the legislative intent of other sufficient reasons exist to displace state law with federal common law." *Georgia Power*, 617 F.2d at 1115-16.

While I agree that the principles of federalism should be protected whenever possible, there are important

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[3]The court did not specifically rule on the breadth and constitutionality of the statute as it applied to federal eminent domain procedures, but recognized that the State had conceded that if the statute were construed to include federal procedure then it would violate the Interstate Commerce and Supremacy Clauses of the United States Constitution. *Id.* At 160.

differences between these two cases and the instant situation that negate the need to resort to creation of a federal common law. First, in each of these cases the issue dealt with compensation, not with the power to condemn. Second, and most important, the courts in these cases were forced to pick some valuation method, while here the court is faced with the choice of adding new and unnecessary procedure. To put it simply, due to a hole in the statute the courts in the relied-upon cases had to adopt some method of valuation or they could not properly compensate the landowners. This court is faced with no such dilemma. Here the defendants are seeking to add a new and supplementary duty to ETNG's grant of eminent domain, something I refuse to do. By rejecting the defendants' argument this court is not choosing federal common law over state law, but is merely refusing to graft a new requirement to those mandated by FERC. *See* Wright, Miller & Kane, 8 *Federal Practice & Procedure* 2d, § 3042, pp. 193-94 (1997) ("Federal condemnation - as contrasted with cases invoking a state's power of eminent domain - is governed by federal law, and state decisions and statutes are neither controlling nor persuasive. This applies to the power of condemnation, [and] the procedure for condemnation....").

Rule 71A was enacted to make uniform eminent domain procedure in the federal courts. To graft state rules on to it would frustrate the purpose of the statute. The defendants have suggested that refusal to enforce state substantive law could lead to the inequitable results in a situation where one landowner could be forced to defend against condemnation in a state court with the protective requirements of state law, while his neighbor could be taken to federal court by the same plaintiff and lose those state protections. While this may be true, there are uniformity benefits to refusing to rely on state law in condemnation actions under the NGA. In a case such as this, where the pipeline extends through more than one state, federal court

defendants will avoid the situation where their substantive rights are determined by which side of the border they live on. I do not believe that striking down the established rule would result in a less uniform distribution of rights.

In light of these cases, there appears to be adequate authority to support the premise that the defendants cannot stop ETNG's condemnation action on the grounds that the plaintiff did not comply with Virginia state law.[4]

C. Failure to negotiate in good faith

Some of the defendants have argued that the motion should be dismissed because of the failure of ETNG to negotiate in good faith with the landowners before commencing with this action. Section 717f(h) of the NGA states the condemnor must demonstrate that it "cannot acquire by contract, or is unable to agree with the owner of property to the compensation to paid for" the interest of the sought property. 15 U.S.C. § 717f(h). Some courts have translated this to require that the holder of a FERC certificate negotiate in good faith with the appropriate owners.[5] *See, e.g., USG Pipeline Co.*, 1 F. Supp. 2d at 822; *Transcon. Gas Pipe Line Corp.*, 745 F. Supp at 369. What actions are necessary to meet this standard are unclear, and the defendants have been unable to point to any federal case

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[4]The defendants are correct in stating that the state law does have a role to play in the protection of property rights. State law defines the existence and extent of any property interests, but once an interest is determined federal law dictates how the property may be attached. See *U.S. v. Bollin*, 264 F.3d 391, 423-24 (4th Cir. 2001).

[5]The defendants here do not point to the NGA, but instead rely on § 25-46.5(A) of the Code of Virginia. As discussed above, federal law controls these issues.

where condemnation was delayed or denied due to a question over good faith negotiations. *See Guardian Pipeline*, 210 F. Supp. at 973 (noting "judicial gloss" of good faith negotiation and lack of enforcement).

In *USG Pipeline*, the court first suggested that the existence of the suit itself proved the inability of the plaintiff to acquire the property by negotiation. The plaintiff detailed the actions it took with regard to negotiations during an evidentiary hearing, which included testimony from field agents on how they had valued the land and on the "discussions" they had with each of the owners. The court noted that the complaints of the landowners were that the path of the easement was uncertain, the compensation offered was too low, the easement would devalue the surrounding land, they were opposed on principle to the pipeline, they did not believe in the government's power of eminent domain, or they just thought they were given "take it or leave it" offers. The court noted that despite their concerns, the owners did not attempt to ascertain the pipeline route and generally did not make counteroffers or follow up at all on the company's offer. The court found that the company had made reasonable efforts to ascertain local land values and negotiate with the landowners.

The defendants point to the letters received from ETNG that seem to be nothing more than a "column of seemingly randomly-chosen dollar figures," and claims that there is no hint of valuation procedures taken that would allow the owners to negotiate. They also claim that future letters changed the amount offered and the shape of the easement. The plaintiff contends that it has more than met the necessary statutory requirements and have settled with over 95% of the landowners, but the remaining defendants

are just seeking to force ETNG to abandon its project.[6] It would seem that in each case ETNG has made at least one offer to the defendant and the defendant has refused that offer.[7] While there is some dispute over what the offers covered and how ETNG arrived at the asked figure, there is no indication that ETNG was acting in anything less than good faith. The easement measurements were delineated in the provided plat, and it seems to me that the only figure the defendants needed was not the value an appraiser placed on the land, but was instead the value the defendants themselves valued it. Put simply, ETNG could have meticulously detailed how it arrived at its offer price, but if the landowner felt the land was worth more that the asked for amount, he or she would not sell.

While I am of the opinion that ETNG has established that it has negotiated with the defendants in good faith, I do not believe that the plaintiff should be held to this standard. In the recent case of *Kansas Pipeline Co. v. A 200 foot by 250 Foot Piece of Land*, 210 F. Supp. 2d 1253 (D. Kan. 2002), the court examined the good faith requirement and found it to be lacking. *Kansas Pipeline* concerned the renewal of a year-to-year lease by a natural gas pipeline company that allowed it to maintain two dehydration units on the landowner's property. The company inadvertently neglected to renew its lease and the landowners informed it

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[6]Certain defendants point to the requirement under Virginia law that "imposes an obligation of good faith in [the] performance or enforcement" of any contract. Va. Code § 8.1-203 (Michie 2001). As I have state above, however, I believe the substantive issues in this case a controlled by federal law.

[7]Many of the current defendants dispute ETNG's right to condemn their property making negotiation difficult if not impossible.

that the lease was terminated. After failing to obtain a new lease or to buy the property from the owners, the company, which held a FERC certificate for the line, exercised its power of eminent domain. As its defense, the landowner claimed that the company had failed to negotiate in good faith. The court disagreed, finding that those courts that had adopted the good faith requirement had failed to explain why they had done so. The court noted that nothing in the NGA requires the holder of a FERC certificate to negotiate in good faith, just that the party seeking to condemn "cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for" the property interest. *Id.* at 1257 (quoting 15 U.S.C. § 717f(h)).

I find the Kansas Pipeline Court's reasoning to be persuasive. Nothing in the NGA or Rule 71A requires a potential condemnor to negotiate in good faith. The defendant's themselves have recognized that "one is to look first at [the statute's] language....Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *North Dakota v. United States*, 460 U.S. 300, 312 (1983). Other than their misplaced reliance on state law, the defendants have failed to give me a reason to read a good faith requirement into the statutory scheme. ETNG has established that it has been unable to acquire the needed property by contract, and that is sufficient to meet the burden established by the NGA.

D. Claims for Individualized Relief

Several of the defendants have included claims relating to the "unique characteristics" of their property, the amount and timing of compensation, and the requirements made by FERC in the Certificate. The sole jurisdiction of the district court in this matter is "to evaluate to scope of the certificate and to order condemnation of the property as authorized in the certificate." *Tennessee Gas Pipeline Co. v.*

104 Acres of Land More or Less, in Providence County, 749 F. Supp. 427 (D.R.I. 1990) These issues do not relate to the ability of ETNG to obtain possession of the property, but instead question the appropriateness and breadth of the FERC Certificate or the amount of compensation. The claims falling in the former category, such as complaints about the location of easement, the timing of blasting, or the placement of erosion controls, are solely the province of FERC, and should have been brought before the Commission during the notice and comment hearings. Any provisions which are unique to a particular parcel of property will be dealt with in the order for immediate possession. The complaints dealing with compensation should be reserved until the court-appointed Compensation Commission begins its investigation.

Once FERC made its order, the only power this court has is to ensure it is properly enforced. As shown above, the order itself is as comprehensive as it is final. This court has neither the desire nor the ability to rule on the necessity of the Certificate or the appropriateness of the orders. *See* 15 U.S.C. § 717r(b) (limiting review of FERC order to circuit courts of appeal). By granting the Certificate, FERC has

> found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity....

15 U.S.C. § 717f(e). Due to the exhaustive nature of the FERC certification process, the jurisdiction of this court is limited to enforcing the order as written. This court cannot

alter FERC's order, it can only allow or deny enforcement. Any complaints concerning the means and timing as laid out in the Certificate must therefore be denied.

E. Constitutional violations

The landowners of one parcel argue that ETNG should not petition this court for a remedy based on "the failure of the Natural Gas Act," but should instead lobby Congress. They quote the Takings Clause of the Fifth Amendment and *Zinermon v. Burch*, 494 U.S. 113, 132 (1990) for the proposition that "in situations where the State feasibly can provide a pre-deprivation hearing before taking property, it generally must do so regardless of the adequacy of the post-deprivation remedy to compensate for the taking."

These defendants also make a Due Process argument that before a post-deprivation remedy satisfies due process, the following conditions must be met: (1) that the deprivation is unpredictable; (2) that pre-deprivation process is impossible; and (3) that the state actor's conduct is unauthorized. Memo. at 3 (quoting *Charbonnet v. Lee*, 951 F.2d 638, 642 (5th Cir. 1992). They contend that since the NGA process is predictable, pre-deprivation process is possible, and since ETNG's conduct is authorized under the NGA, then immediate possession is improper. Their arguments rely on a lack of process, yet I have held hearings on this issue. The only assumption that can be made is that the defendants here are really making an argument that possession is improper *before* compensation is awarded.

The U.S. Supreme Court recently reaffirmed the government's ability to condemn private land in *Brown v. Legal Foundation of Washington*, 2003 WL 1523550 (March 26, 2003), by stating: "While it confirms the state's authority to confiscate private property, the text of the Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for a 'public use' and 'just

compensation' must be paid to the owner." Taking property is in itself not unconstitutional until compensation is denied. *Shooting Point, L.L.C. v. Cumming*, 238 F. Supp. 2d 729 (E.D. Va. 2002). Therefore, "a takings claim becomes ripe only after a property owner has availed himself of all available state procedures and has been denied." *Id.* There is no Fifth Amendment requirement that the compensation be paid before or contemporaneous to the taking, just as long as the payment is reasonable, certain, and adequate. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) ("The Fifth Amendment does not require that compensation precede the taking."); *Cosme Rosado v. Serrano Rodriguez*, 96 F. Supp. 2d 117, 122 (D.P.R. 2002); *Johnson v. U.S.*, 208 F.R.D. 148, 155 (W.D. Tex. 2001); *US West Communications, Inc. v. Minnesota Public Utilities Com'n*, 55 F. Supp. 2d 968, 989 (D.Minn. 1999) All that is required to satisfy due process concerns here is that there be some sort of pre-deprivation hearing. *Cosme Rosado*, 96 F. Supp. 2d at 122.

All of the requirements for a constitutional taking have been met in this case. The defendants have received ample process, such as the hearing incident to this motion, and the bond posted by the plaintiffs provides assurance that compensation will be paid once the Commission has had time to properly consider the issue. I find, then, that the defendants constitutional rights have been adequately protected.

III. Conclusion

It appears that the plaintiff has finally reached a stage where it can begin to implement the powers granted by FERC. As defendants have been unable to provide any sound reason why I should not enforce the plaintiff's FERC Certificate, I find that the ENTG has established its right to exercise eminent domain over the defendants' property as

outlined in the Certificate. The plaintiff's motion for immediate possession will be GRANTED and an appropriate order entered.

Jackson L. Kiser
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

EAST TENNESSEE NATURAL GAS COMPANY,
Plaintiff,

v.

3.51 ACRES IN WYTHE COUNTY, VIRGINIA,
RONNIE LYNN GOFORTH and SUSAN D. GOFORTH,
MARY CASEL, COMMISSIONER OF REVENUE,
JOHN DOE, et al. and UNKNOWN OTHERS,
Defendants.

Case No. 4:02CV00215
By: Jackson L. Kiser, Senior U.S. District Judge

ORDER GRANTING POSSESSION

East Tennessee Natural Gas Company filed its complaint for condemnation in the above-entitled proceedings, in which it is prayed that this Court enter and order granting it immediate possession of the lands described in the Complaint. As set forth in detail in the Order and Memorandum Opinion filed on May 8, 2003, ETNG has established its right to exercise eminent domain over the Defendants' property as outlined in the Certificate of Public Convenience and Necessity ("Certificate"), and thus its motion for immediate possession should be granted. ETNG shall comply with all general conditions applicable to Defendants' property as set forth in the Certificate. The Certificate does not contain any conditions that are unique to this property.

It is hereby ORDERED that East Tennessee Natural

Gas Company be put into immediate possession of the property sought to be condemned in the above-entitled action, and that the defendants in such action surrender possession of the said property to East Tennessee Natural Gas Company accordingly. The United States Marshall's office is ordered to aid the Plaintiff in enforcement of this Order as necessary.

Done this 30th day of May, 2003.

Jackson L. Kiser
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

EAST TENNESSEE NATURAL GAS COMPANY,
Plaintiff,

v.

VARIOUS PARCELS OF LAND,
Defendants.

Case No. 4:02CV00215
By: Jackson L. Kiser, Senior U.S. District Judge

SUPPLEMENTAL MEMORANDUM OPINION

I. Factual Background

On February 28, 2003, the Court heard oral argument on the East Tennessee Natural Gas's ("ETNG" or "plaintiff") motion for immediate possession, and on March 4, 2003, I took the motion under advisement until I had considered the question of whether ETNG had been granted the power to condemn the defendants' property. On May 8, 2003, the Court entered an opinion and order granting ETNG's motions for possession which addressed the various arguments of the defendants as to ETNG's power to exercise its right of eminent domain. What I failed to address at that time, however, were the defendants' deferred arguments against ETNG's immediate possession of the various parcels of land.

II. Parties' Contentions

The arguments consist of two basic assertions:

1. The Natural Gas Act ("NGA") does not contain a provision for immediate possession.

2. Immediate possession can be granted to ETNG only by the exercise of the Court's equitable powers and it would be inequitable for the Court to grant ETNG immediate possession.

I will address the arguments in turn.

III. Analysis

The defendants are correct and ETNG agrees that there is no grant of the right to immediate possession in the NGA. *See Northern Border Pipeline Co. v. 127.79 Acres of Land*, 520 F. Supp. 170 (D.N.D. 1981). Moreover, the defendant's argue that because Congress did not include the right in the NGA (as it has in other statutes, *see* 40 U.S.C. § 3114, the Declaration of Taking Act), an exercise of the Court's equitable powers to grant the right to early possession would be, in effect, amending the Act and thereby usurping the legislative powers of Congress. *See* Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Immediate Possession at 3-7. With all due respect, I disagree with this rationale. As I see it, Congress did not give a private condemnor the right tho immediate possession so that this issue would be left to the courts to consider on a case-by-case basis. By doing so, the condemnor would be under the supervision of the court rather than having carte blanc authority to enter the property. Thus, Congress entrusted the issue of immediate possession to the equitable powers of the Court. *Atlantic Seaboard*

Corporation v. Van Sterkenburg, 318 F.2d 455 (4th Cir. 1963) ("Inherently, however, the condemnation court possesses the power to authorize immediate entry by the condemnor upon the condemned premises"); *Tenn. Gas Pipeline Co. v. New England Power, C.T.L., Inc.*, 6 F. Supp.2d 102, 104 (D. Mass.1998) ("[T]he district court does have the equitable power to grant immediate entry and possession where such relief is essential to the pipeline construction schedule."); see *Northern Border Pipeline Co. v. 127.70 Acres of Land*, 520 F. Supp. 170, 172 (D.N.D. 1981). This brings me to the next argument of the defendants as to whether the Court should use its equitable powers to grant early possession to ETNG in the form of a preliminary injunction. I think it should.

Although no court in this circuit has considered the issue of immediate possession after the plaintiff's power of condemnation has been affirmed but before compensation has been awarded, other districts have done so and have found that the court's inherent powers extend that far as long as the plaintiff is able to meet the requirements for injunctive relief. *See generally Northwest Pipeline Corp. v. The 20' x 1,430' Pipeline Right of Way Easement ' x 1560' Temporary Staging Area*, 197 F. Supp.2d 1241 (E.D. Wash. 2002); *Northern Border Pipeline Co. v. 64.111 Acres of Land*, 125 F. Supp.2d 299, 301 (N.D. Ill. 2000); *Tenn. Gas Pipeline Co. v. New England Power, C.T.L., Inc.*, 6 F. Supp.2d 102, 104 (D. Mass. 1998); *USG Pipeline Co. v. 1.74 Acres of Land*, 1 F. Supp. 2d 816 (E.D. Tenn. 1998).

In the Fourth Circuit, the standard for injunctive relief has long been the four-part test set forth in *Blackwelder Furniture Company of Statesville, Inc., v. Selig Manufacturing Company, Inc.*, 550 F.2d 189 (4th Cir. 1977). That test requires the district court to determine "(1) the likelihood of irreparable harm to the plaintiff if preliminary injunction is denied, (2) the likelihood of harm to the defendant if the relief requested is granted, (3) the likelihood

that the plaintiff will succeed on the merits, and (4) the public interest." *Direx Isreal, Ltd., v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991); see *Blackwelder*, 550 F.2d at 193-95.

In weighing the harm to the plaintiff against the harm to the defendant, the third factor, plaintiff's likelihood of success plays an important role. If the plaintiff's likelihood of success is great, the extent of the harm he may suffer need only be slight. Conversely, if plaintiff's likelihood of success is slight, then the harm he may suffer must be great. The corollary to this is that where the plaintiff's likelihood of success is great, the defendant's harm must be great.

The issues as to whether ETNG had the power and the right to condemn the various parcels of land were resolved in the Court's May 8 opinion and order. Thus, element 3 of the *Blackwelder* test - plaintiff's likelihood of success - is not open to speculation. Plaintiff has already prevailed on that issue. Consequently, plaintiff need only show slight harm and defendant must suffer great harm. I find that an extended delay would harm the plaintiff. Of the numerous parcels of property involved in the project,[1] only the ones under consideration have not permitted the commencement of construction. To require ETNG to build up to a parcel of land they do not possess, skip that parcel, and then continue on the other side would be inefficient and wasteful. Moreover, it would cause undue delay and "significant financial harm" both to ETNG and some of its putative customers. Affidavit of Rick Smith, p 6.

Defendants argue that there is a legal remedy for delay expenses and, therefore, a cause in equity does not lie. I disagree. The argument would be more persuasive if there were but a single parcel of land involved, such as *National*

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[1]In the Commonwealth of Virginia, ETNG has brought condemnation actions against 133 parcels.

Fuel Gas Supply v. 138 Acres, 186 F. Supp. 2d 339 (W.D.N.Y. 2001), but here there is a series of parcels owned by different landowners and any single parcel has the potential of holding up the entire project. There remains some 85 parcels that will be the subject of a just compensation before a commission. Obviously, that will take an extended period of time. To delay the project's completion until compensation for the last parcel is determined would be inequitable. Plaintiff has demonstrated more than slight harm.

The defendants are unable to prove that they would suffer great harm. The only harm the defendants have shown is a delay in having their compensation determined before surrendering possession of their property. Even this is blunted by their right to draw down the money ETNG has deposited with the Court based on ETNG's appraisal. The defendants' harm is slight at best.

Part four of the *Blackwelder* test - public interest - was resolved by FERC insofar as the pipeline being in the public interest is concerned. FERC also conditions its certificate to try to address the concerns of the landowners. FERC, having determined the need for the pipeline and the conditions under which it could be built, it seems to me that an expeditious completion of the pipeline is in the public interest.

IV. Conclusion

Taking all of this into account, I find that ETNG has met all four requirements under *Blackwelder*. In doing so, it has established a right to immediate possession of the delineate easement on the defendant's property. Therefore, the orders granting immediate possession were appropriately entered.

Jackson L. Kiser
Senior United States District Judge

15 U.S.C. § 717(h). Right of eminent domain for construction of pipelines, etc.

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transporation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, That the United States district courts shall only have jurisdicion of cases when the amount claimed by the ownwer of the property to be condemned exceeds $ 3,000.00.

(3) (2)

Nos. 04-174 & 04-221

Supreme Court, U.S.
FILED
OCT 4 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MAYNARD R. JOYCE, *et al.*,

Petitioners,

-and-

RONNIE LYNN GOFORTH, SUSAN D. GOFORTH, and WEAVER ENTERPRISES, INC.,

Petitioners,

v.

EAST TENNESSEE NATURAL GAS COMPANY,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

LELA M. HOLLABAUGH
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QUESTION PRESENTED

Petitioners present only one question for review, although they have stated it two different ways. Respondent East Tennessee Natural Gas Company ("ETNG") believes that the issue is more properly stated as follows:

Consistent with courts across the country, and as authorized by Fed. R. Civ. P. 65 and 71A, did the district court properly issue a preliminary injunction granting ETNG possession of easements for the construction and operation of an underground natural gas pipeline on Petitioners' properties after first determining that ETNG had a substantive right to condemn the easements?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, East Tennessee Natural Gas, LLC f/k/a East Tennessee Natural Gas Company has the following parent corporations:

ETNG is an indirect wholly owned subsidiary corporation of Duke Energy Corporation that is publicly traded.

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JURISDICTION

This Court does not have jurisdiction over the matter of *Ronnie Lynn Goforth and Susan D. Goforth v. East Tennessee Natural Gas Company*. Although the docket record indicates to the contrary, the Goforths' case was not consolidated with any other cases before the Fourth Circuit. The Goforths failed to file a petition for rehearing or rehearing *en banc* in the Fourth Circuit. Thus, the time to file a petition for a writ of certiorari in this Court expired prior to the filing of this Petition. Sup. Ct. Rule 13(3). The time limit to file a petition for writ of certiorari is mandatory and jurisdictional. *See Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88, 99 (1994).

The Goforths attempt to circumvent this error by filing a joint petition for a writ of certiorari with Petitioner Weaver Enterprises. Unlike the Goforths, Weaver Enterprises filed a petition for rehearing or rehearing *en banc* in the Fourth Circuit and its Petition to this Court is timely.

STATEMENT OF THE CASE

Following a 16-month review process, the Federal Energy Regulatory Commission ("FERC") issued ETNG a certificate of public convenience and necessity to construct an interstate natural gas pipeline known as the Patriot Project to serve the natural gas needs of portions of Tennessee, Virginia, and North Carolina. Appendix to Petition for Writ of Certiorari ("Pet. App.") at 12a-13a.[1] FERC required ETNG

1. This Response is filed in response to two separate petitions. The Petitioners in *Joyce, et al. v. East Tennessee Natural Gas Co.*, 04-0174 will be referred to herein as "Joyce Petitioners." The (Cont'd)

to complete the Patriot Project by January 1, 2005. Upon issuance of the certificate of public convenience and necessity, pursuant to the Natural Gas Act, ETNG became vested with the power of eminent domain over any lands needed for the project. 15 U.S.C. § 717f(h).

ETNG's attempts to amicably acquire easements from affected landowners were largely successful. Of the more than 1300 landowners affected by the Patriot Project, in excess of ninety percent of the landowners reached agreement with ETNG without the necessity of litigation. Pet. App. at 14a. To acquire easements in the remaining parcels, ETNG filed 133 condemnation actions, naming as defendants those landowners with whom it had been unable to reach agreement, including Petitioners. Consistent with the certificate of public convenience and necessity, ETNG sought to condemn temporary (two-year) and permanent easements, each generally no wider than 50 feet. Along with the complaint in each case, ETNG filed motions requesting that the district court use its inherent equitable power to grant it immediate possession of the easements requested. ETNG pleaded that it was without an adequate legal remedy and it would suffer great delay and expense if not allowed possession prior to a determination of just compensation.

ETNG also deposited funds with the district court for the temporary and permanent easement interests in each parcel of land in amounts estimated to be just compensation for the individual tracts affected. The defendant landowners

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(Cont'd)

Petitioners in *Goforth, et al. v. East Tennessee Nat. Gas Co.*, 04-0221 will be referred to herein as "Weaver Petitioners." Both groups of Petitioners will be referred to collectively as "Petitioners." References to the Appendix will be to the Joyce appendix.

are allowed to immediately draw down the money ETNG deposited. Pet. App. at 32a, 42a. After the condemnation actions were filed, ETNG reached settlements with additional landowners.

On March 4, 2003, following an initial hearing on the matter, the district court bifurcated the cases. Pet. App. at 49a. In phase one, the district court would consider ETNG's right to condemn. In phase two, pursuant to Fed. R. Civ. P. 71A, a commission would determine compensation due the defendant landowners. Pet. App. at 49a. On May 8, 2003, after a second hearing on the matter, the district court entered an order and memorandum opinion finding that ETNG "has established its right to exercise eminent domain over the defendants' property" and granting ETNG's motion for possession contingent on ETNG meeting other requirements set forth in that order. Pet. App. at 63a. On June 6, 2003, the district court entered a supplemental memorandum opinion addressing Petitioners' arguments against ETNG's immediate possession of the property. Pet. App. at 38a-42a. The district court held that "Congress entrusted the issue of immediate possession to the equitable powers of the Court." *Id* at 39a. The district court further considered each of the four requirements for injunctive relief and found them satisfied. Pet. App. at 40a-42a.

Petitioners thereafter conceded that the district court properly determined that ETNG has the right to condemn their property for a natural gas pipeline that is necessary to serve the public needs of citizens in North Carolina, Virginia and Tennessee. Pet. App. at 15a.

On March 22, 2004, the Fourth Circuit issued its opinion affirming the district court's injunction order. Pet. App. at

1a-35a.[2] The Fourth Circuit held that the district court's injunction order was consistent with the U.S. Constitution, established principals of equity, the Natural Gas Act, the Federal Rules of Civil Procedure, and was not an abuse of discretion. Pet. App. at 29a. The Fourth Circuit noted that "the need for natural gas in a region with little or no service — made it especially appropriate for the district court to consider equitable relief that would allow expeditious construction of the pipeline." *Id.* Petitioners' requests for rehearing and for rehearing *en banc* (other than the putative Goforth petitioners) were denied. Pet. App. at 65a-74a.

Construction of the Patriot Project has been completed and natural gas is flowing through the pipeline. ETNG may not now abandon or terminate its operation of the pipeline and the provision of natural gas provided by the Patriot Project without a FERC order under 15 U.S.C. § 717f(b). If the district court had not exercised its inherent equitable power, the pipeline would not have been completed by the date FERC required and citizens of several states would be without the necessary energy the pipeline now provides.

REASONS FOR DENYING THE PETITION

The Court should deny the Petitions. First, the Fourth Circuit's well-reasoned decision does not conflict with the decision of any other Circuit. Unremarkably, the Fourth Circuit affirmed the use of a remedy often used to facilitate the construction of linear pipeline projects necessitated by our growing energy needs. Long-standing precedents allow

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2. The Fourth Circuit's opinion is reported at 361 F.3d 803 (4th Cir. 2004). References to the opinion will refer to the Joyce Petitioners' appendix instead of the reported decision.

immediate possession of condemned property prior to the payment of just compensation. The use of injunctive relief below does not raise important, new or unanswered questions of federal law.[3] Second, Petitioners' separation of powers argument is futile. The remedy employed below and by other federal courts flows from the specific grant of the power of eminent domain to natural gas companies and complies with Fed. R. Civ. P. 71A. Third, Petitioners' attempt to equate quick take powers with injunctive relief ignores the fundamental differences between the two remedies. Fourth, the courts below did not expand the use of injunctive relief. Fifth, contrary to the Weaver Enterprises Petitioners' argument, landowners are entitled to just compensation, not to profit at the public's expense.

Simply put, Petitioners articulate no compelling reason for review by this Court. Sup. Ct. R. 10.[4]

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3. Petitioners challenge only whether injunctive relief is available. They implicitly concede that if it is available, they have no complaint about its use here.

4. The Joyce Petitioners' complaint that the district court erred by ordering the United States Marshal's Service to aid in the enforcement of the court's possession order if necessary (Joyce Pet. at i, 3, 30), was never raised below. Even if the Court were inclined to reach this never-before raised argument, it is unsupported by any authority. Moreover, Petitioners Joyce's statement that "[t]he marshals, at the direction of ETNG, patrolled the landowner's property and has [sic] maintained a constant presence throughout the construction" (*id.* at 3) is inaccurate and unsupported in the record.

I. No Conflict Exists Between the Decisions of the Fourth Circuit and the Seventh Circuit.

The Fourth Circuit's decision does not conflict with *Northern Border Pipeline Co. v. 86.72 Acres of Land*, 144 F.3d 469 (7th Cir. 1998). In *Northern Border*, unlike the case *sub judice*, the pipeline company did not claim a substantive entitlement to the property and specifically disavowed such entitlement. *Id.* at 472. The Seventh Circuit held that absent a determination of a substantive entitlement to the property, the district court properly denied the request for an injunction. *Id.* As the Fourth Circuit pointed out, *Northern Border* is distinguishable because the company in that case had not obtained an order determining that it had the right to condemn before it sought injunctive relief. Pet. App. at 29a. Because ETNG did obtain such an order, unlike the company in *Northern Border*, its request for injunctive relief was "grounded in substantive law establishing a preexisting entitlement to the property." ETNG was thus justified in invoking the district court's equity jurisdiction. Pet. App. at 29a-30a ("once a district court determines that a gas company has the substantive right to condemn property under the NGA, the court may exercise equitable power to grant the remedy of immediate possession through the issuance of a preliminary injunction").

Subsequent to *Northern Border*, several district courts in the jurisdiction of the Seventh Circuit have addressed the Seventh Circuit's "substantive entitlement" requirement. In both *Guardian Pipeline, L.L.C. v. 950.80 Acres of Land*, 210 F. Supp. 2d 976 (N.D. Ill. 2002), (citing, *Commercial Station Post Office v. United States*, 48 F.2d 183, 184 (8th Cir. 1931)) and *Northern Border Pipeline Co. v. 64.11 Acres of Land*, 125 F. Supp. 2d 299, 301 (N.D. Ill. 2000) (distinguishing

Northern Border Pipeline Co. v. 86.72 Acres of Land and holding that an order of condemnation gives the pipeline company a "substantive entitlement" to immediate possession), the courts granted immediate possession after first entering orders confirming the plaintiffs' proper exercise of the power of eminent domain but before compensation was determined. That is precisely the procedure that the district court in the instant case followed.

As the Fourth Circuit stated, after first determining that ETNG had a substantive right to condemn the landowners' property, the district court could then properly consider whether to grant the condemnor's request for injunctive relief. Pet. App. at 29a-30a. The right to condemn flows from § 717f(h) and after an affirmative determination that the natural gas company has complied with its requirements the gas company has a substantive right to condemn.[5] This property interest is one "which a court of equity will enforce and protect." *See Seymour v. Freer*, 75 U.S. 202, 213-14 (1868).

In sum, the Fourth Circuit correctly reasoned that *Northern Border* does not support Petitioners' argument. Pet. App. at 28a-29a. There is no conflict between the Circuits. To the contrary, and as discussed below, a uniform and now substantial body of federal case law supports this equitable remedy.

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5. Petitioners challenged ETNG right to condemn the property before the district court. Each of their challenges to ETNG's right to take was considered and rejected by the district court. Pet. App. at 46a-64a. However, as stated above, this point was conceded on appeal. Pet. App. at 15a.

II. The District Court's Preliminary Injunction Order Granting ETNG Immediate Possession Does Not Violate the Separation of Powers Doctrine.

A. Congress did not expressly limit equitable relief in the Natural Gas Act.

Petitioners contend that a condemning authority may only seize property prior to paying just compensation when specifically authorized by Congress. Yet, they fail to cite a single case holding that the use of the injunction procedure to award possession before payment of just compensation is improper. Moreover, their argument is contrary to the well-settled tenet of statutory construction that a court will presume the availability of all remedies unless Congress has expressly provided to the contrary. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 70-71 (1992); *Bell v. Hood*, 327 U.S. 678, 684 (1946).

This Court has held that it will not lightly assume that Congress has stripped courts of their equitable jurisdiction; rather a departure from equity requires a clear and valid legislative command. *See Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). The "power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case." A statute's silence on a particular remedy "'is no more significant than the fact that it does not in terms authorize the execution to issue on a judgment.'" *Franklin*, 503 U.S. at 68 (quoting, *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 288 (1940)). In *Franklin*, this Court held that a plaintiff had a private cause of action pursuant to 20 U.S.C. §§ 1681-88 (Title IX) even

though a private right of action is not expressly set out in the statute. 503 U.S. at 70-71. In addition, available remedies specifically include equitable remedies, even when they are not spelled out in the statute. *See Cobell v. Norton*, 240 F.3d 1081, 1108 (D.C. Cir. 2001) (citations omitted) (affirming the district court's finding of equitable remedies for beneficiaries of individual Indian trust accounts against agencies that had mismanaged the trusts, even though the federal statutes protecting the Indian trust accounts did not specifically provide for equitable remedies). This Court has also emphasized that in cases involving the public interest as identified by statute, which this case involves, a court's equitable discretion "must be exercised in light of the large objectives of the Act. For the standards of the public interest not the requirements of private litigation measure the propriety and need for injunctive relief in these cases." *Hecht*, 321 U.S. at 331. "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 552 (1937) (citations omitted).

FERC determined that the construction of ETNG's pipeline was in the public interest and established an in-service date of January 1, 2005. Thus, the district court properly exercised its equitable authority and allowed ETNG to enter the properties to construct the pipeline.

The Joyce Petitioners' reliance on the Court's holding in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) to support their argument that immediate possession is a power of eminent domain vested in Congress that cannot be authorized by the judiciary without explicit grant from

Congress (Pet., *passim*) is misplaced. *Youngstown* involved a situation in which the President through executive order took temporary possession of steel mills to avoid a nationwide steelworkers strike. The President did not assert he was entitled to take permanent title to the steel mills or that he was operating under a statutory power of eminent domain. This Court held that the President did not have the authority to issue such an executive order. *Id* at 585. The Constitution did not give the President this authority and there was no act of Congress from which this power could fairly be implied. *Id.* at 585. Moreover, Congress had specifically considered and rejected an amendment to the Taft-Hartley Act that would have authorized seizure of property under certain circumstances to avoid a labor dispute. *Id.* at 586. In the case at hand, Congress specifically authorized the use of eminent domain by interstate natural gas companies upon receipt of a Certificate of Public Convenience and Necessity. 15 U.S.C. § 717f(h).

The Joyce Petitioners also cite to 26 Am. Jur. 2d Eminent Domain § 5 (1996) for the same proposition. Pet. at 7. However, even if authoritative, this section recognizes that while the exercise of the power of eminent domain is a legislative function "once authority is given to exercise the power of eminent domain, the matter ceases to be wholly legislative. . . ." This section does not discuss "quick take," immediate possession or the procedure for permitting possession. *Id.*

Also unavailing is the Joyce Petitioners' reliance upon *Johnson v. Collins Entm't Co.*, 204 F.3d 573, 575 (4th Cir. 2000) in support of their position that the use of equitable power to grant the remedy of immediate possession under these circumstances constitutes impermissible judicial

activism. Pet. at 15. The *Johnson* case does not address the issue of eminent domain powers and deals with the issue of alleged federal judicial infringement over basic state regulatory functions. Interestingly, Petitioners deleted from their quotation of the Court's opinion the specific circumstances of the "judicial activism." The quotation properly reads "[i]nherent power wielded by life-tenured judges without authorization in statute *over the basic functions of a sovereign state* simply go too far." *Johnson* at 575 (emphasis supplied). Considered in its context, *Johnson* does not support Petitioner's argument.

B. The remedy approved by the Fourth Circuit and a myriad of other courts is consistent with the procedural framework of Rule 71A.

Rule 71A of the Federal Rules of Civil Procedure was adopted to provide uniformity to the various condemnation procedures and sets forth certain procedures specific to condemnation. *Kirby Forest Industries, Inc. v. United States*, 476 U.S. 1, 4 (1984).

The drafters of Rule 71A specifically contemplated the condemning authority taking possession prior to a hearing on just compensation. Specifically, Rule 71A provides:

> If no hearing has begun to determine the compensation to be paid for a piece of property and the plaintiff has not acquired the title or a lesser interest in or *taken possession*, the plaintiff may dismiss the action as to that property, without an order of the court . . .

71A F. R. Civ. P. 71A(i)(l) (emphasis supplied).

Rule 71A also addresses the applicability of other rules of civil procedure in condemnation proceedings.

> The Rules of Civil Procedure for the United States District Courts govern the procedure for condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

F. R. Civ. P. 71A(a). The remaining sections of Rule 71A do not limit the use of Rule 65 in condemnation matters. Thus, Rule 65 remains a viable remedy in condemnation actions.

Likewise, as the Fourth Circuit held, Congress tacitly approved the Federal Rules of Civil Procedure, including Rules 65 and 71A: "Congress has never given any indication that it disapproves of [the use of the injunction procedure]" even in light of the extensive case law utilizing this procedure.[6] Pet. App. at 23a.

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6. *See, e.g., Williston Basin Interstate Pipeline Co. v. Easement and Right-of-Way Across .152 acres of land*, 2003 U.S. Dist. Lexis 11163 (N.D. Ill. 2003); *Northwest Pipeline Corp. v. The 20'x 1,430' Pipeline Right of Way Easement*, 197 F. Supp. 2d 1241 (E.D. Wash. 2002); *Guardian Pipeline, L.L.C. v. 950.80 Acres of Land*, 210 F. Supp. 2d 976 (N.D. Ill. 2002) (citing, *Commercial Station Post Office v. United States*, 48 F.2d 183, 184 (8th Cir. 1931)); *Vector Pipeline, L.P. v. 68.55 Acres of Land*, 157 F. Supp. 2d 949, 951 (N.D. Ill. 2001); *Northern Border Pipeline Co. v. 64.11 Acres of Land*, 125 F. Supp. 2d 299, 301 (N.D. Ill. 2000); *Tennessee Gas Pipeline v. New England Power, C.T.L., Inc.*, 6 F. Supp. 2d 102, 104 (D. Minn. 1998); *USG Pipeline Co. v. 1.74 Acres of Land in Marion County, Tennessee*, 1 F. Supp. 2d 816, 826 (E.D. Tenn. 1998); *Kern River Gas Transmission Co. v. Clark County, Nevada*, 757 F. Supp. 1110, 1117 (D. Nev. 1990); *Northern Border Pipeline Co. v. 127.79 Acres*

(Cont'd)

In sum, Petitioners' separation of powers argument is makeweight and overlooks the substantial authority supporting the granting of injunctive relief to effect a substantive right granted by Congress.

III. The District Court Did Not Grant ETNG "Quick Take" Rights or Powers.

Below and in this Court, the Joyce Petitioners improperly equate the "quick take" remedy with the separate and distinct injunction remedy. Petitioners ask this Court to make the illogical leap that because Congress did not grant natural gas companies quick take power, Congress precluded district courts from using their equitable power to grant natural gas companies immediate possession. The primary fallacy in this argument is that the two remedies are fundamentally different.[7] "Quick take"

(Cont'd)
of Land, 520 F. Supp. 170 (D.N.D. 1981). Other courts have held that immediate possession is an available and appropriate remedy provided the condemning authority can make the appropriate showing of need. *Nat'l Fuel Gas Supply Corp. v. 138 Acres of Land*, 84 F. Supp. 2d 405, 415 (W.D.N.Y. 2000); *Humphries v. Williams Natural Gas Co.*, 48 F. Supp. 2d 1276, 1280 (D. Kan. 1999).

7. The Joyce Petitioners punctuate their brief with references to "these powers" or "such powers," lumping together the very different, virtually automatic, quick take power with the more stringent requirements for injunctive relief. The Joyce Petitioners also mischaracterize the Fourth Circuit's holding to advance their argument. The Fourth Circuit did not conclude that district courts are authorized by Rule 65 to grant quick take power in the form of injunctive relief. Pet. at 17, 18, 21. The Fourth Circuit instead held that "a gas company with condemnation power under the NGA may apply under Rule 65(a) for a preliminary injunction awarding immediate possession." Pet. App. at 23a.

is the ***automatic vesting*** of title in the condemner after certain procedural steps have been taken. Pet. App. at 24a; 40 U.S.C. § 3114. For example, the Declaration of Taking Act authorizes the government to take possession of condemned land immediately upon the filing of a declaration that cites the authority for the taking, describes the public use and includes a deposit of funds with the court equal to the estimated just compensation due the landowner. 40 U.S.C. § 3114(a). The process involves minimal judicial oversight by the district court.

In contrast, granting a natural gas company immediate possession through an injunction is far from an automatic procedure. Courts that have used their equitable powers to grant immediate possession have done so only after a deliberate and careful analysis of the strict requirements for such relief. *E.g.*, Pet. App. at 40a-42a. In fact, one district court held the natural gas company failed to meet the requirements for equitable relief and denied its request. *See Nat'l Fuel Gas Supply Corp. v. 138 Acres*, 84 F. Supp. 2d 405, 416 (W.D.N.Y. 2000) (equitable relief "unwarranted" where the evidence conflicted on whether the company would be irreparably harmed absent issuance of an injunction). The New York district court's decision refutes the Weaver Enterprises' argument that an injunction is a "result oriented device [used] to ensure that immediate possession will be granted." Weaver Enterprises Pet. at 16. It likewise refutes the Joyce Petitioners' argument that lower courts have turned Rule 65 into a "blank check" for the unrestrained exercise of equitable power. Joyce Pet. at 18. Instead, the remedy of immediate possession effected by a Rule 65 injunction is to be determined on a case by case basis, is permitted only after a judicial finding of a substantive right to take and after the movant has met the rigorous requirements for an injunction as set forth in Rule 65, and construing case law. Pet. App. at 25a.

Therefore, the remedy approved by the Fourth Circuit, and the many district courts that have utilized their inherent equitable power to grant immediate possession, is not inconsistent with Congress' decision to withhold the right of quick take power from private companies who are vested with eminent domain power under the Natural Gas Act. Petitioners' argument requires that the Court overlook the substantial difference between quick take power, which involves minimal judicial oversight, and the exercise of inherent equitable power, which requires substantial consideration by the judiciary, including the right to an immediate appeal. 28 U.S.C. § 1292(a)(1).

IV. The Fourth Circuit's Decision Does Not Expand the Use of Equity to Create Rights That Do Not Exist at Law.

The Joyce Petitioners' argument that the Fourth Circuit's decision opens the gateway for judges to legislate new rights in the guise of granting injunctive relief ignores the well-established standards courts utilize to determine whether injunctive relief is appropriate, including a specific finding that a litigant is likely to prevail on the merits of the substantive rights it is asserting. In this case, the Fourth Circuit's decision specifically reiterated and relied on these well-settled injunction standards as set forth in *Blackwelder Furniture Co. of Statesville, Inc. v. Selig*, 550 F.2d 189 (4th Cir. 1977). Pet. App. at 30a-34a.

The circular nature of Petitioners' argument is evident. Petitioners assert that the district court created new substantive rights by issuing an injunction to enforce ETNG's legal right to take possession of their property; however, Petitioners do not contest that ETNG does in fact hold this

right. Following the Petitioners' logic, injunctive relief would never be available because the enforcement of an undisputed legal right could never occur until the right is fully adjudicated. Such a result diminishes substantive legal rights instead of creating new rights as suggested by Petitioners.

The Fourth Circuit simply disagreed with Petitioners that immediate possession is a substantive right. The court correctly determined that possession of property might be an appropriate remedy after a judicial finding of a substantive right to take and satisfaction of the rigorous requirements to obtain an injunction. This is not the creation of a new substantive right. If ETNG did not have a substantive right to take pursuant to the Natural Gas Act, it would not be proper to invoke the equitable powers of the court to gain possession of the property.

Finally, the courts below properly determined that the equitable remedy of immediate possession is the appropriate method to protect landowners' interests and facilitate construction of projects deemed to be in the public interest. Without such a remedy, people who simply do not want the project in their backyard could prevent construction of a necessary public project jeopardizing the public good.

V. Petitioners are Only Entitled to Just Compensation for Their Properties.

This Court has recognized that "in view of the liability of all property to condemnation for the common good, loss to the owner of non transferable values deriving from his unique need for property or idiosyncratic attachment to it . . . is properly treated as part of the burden of common citizenship." *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949). Similarly, the landowner is only "entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is *not* entitled to more." *Olson v. United States*, 292 U.S. 246, 255 (1934) (emphasis supplied); *see also Kirby Forest Indus., Inc.*, 467 U.S. at 10 (landowner is entitled to fair market value of the property on the date of the taking measured by what a willing buyer would pay a willing seller). Price gouging such as that proposed by the Weaver Enterprises Petitioners is contrary to the public interest, undermines the purpose of the power of eminent domain, and is inconsistent with this Court's precedent.

Not surprisingly, the Weaver Enterprises Petitioners fail to cite a single case in support of this putative "right" to negotiate to a higher than fair market value. No "right" exists. Taking their argument to its logical conclusion, every landowner, over 1300 landowners were affected by the Patriot Project, would refuse to negotiate, defend the condemnation complaint, and make every effort to delay the litigation until ETNG was financially forced to abandon the project. Given the capital outlay necessary for a project such as the one at hand ($258 million), public projects deemed necessary by FERC would be abandoned and the country's development of energy infrastructure stymied. Such a result ignores the public's need for natural gas.

CONCLUSION

In light of the foregoing, Ronnie Lynn Goforth and Susan D. Goforth should be dismissed as Petitioners and then these petitions for writs of certiorari should be denied.

Respectfully submitted,

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